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No. ....
IN THE

Supreme Court of the United States

October Term, 1980

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented.

1. Whether the lower federal courts encroached upon the primary jurisdiction of the Interstate Commerce Commission by refusing to refer the issues of tariff interpretation and application to the Commission.

2. Whether the lower federal courts erred in excluding petitioner's evidence of local or trade usage under the tariff and in applying the rules of tariff interpretation, thereby reaching an interpretation which subjected defendant to criminal liability for violations of the Elkins Act.

3. Whether the lower federal courts erred in refusing to permit the petitioner to introduce evidence in support of its defense of good faith interpretation of the tariff and refusal to instruct the jury in good faith interpretation defense as enunciated in *Lehigh Coal & Nav. Co. v. United States*, 250 U.S. 556 (1919).

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, The Atchison, Topeka and Santa Fe Railway Company, a Delaware corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on October 10, 1980.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is an unpublished opinion entered on October 10, 1980. A copy of the opinion is included in the appendix as Exhibit A.

The Memorandum of Decision and Order of the District Court for the Central District of California denying motions

filed by petitioner for arrest of judgment, judgment of acquittal, and for a new trial, was entered on March 12, 1980, and is included in the Appendix as Exhibit C.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit, affirming judgment of the District Court for the Central District of California, was entered on October 10, 1980. Rehearing was denied without comment on January 26, 1981 and that order is included in the Appendix as Exhibit B. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statute Involved.

Petitioner was prosecuted for violation of the Elkins Act, 49 U.S.C. §41(1). Said section is set forth in entirety in the appendix as Exhibit D.

Statement of the Case.

The Atchison, Topeka and Santa Fe Railway Company,[1]

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[1]The following listing of parent, subsidiary and affiliate corporations of The Atchison, Topeka and Santa Fe Railway Company is provided pursuant to Supreme Court Rule 28.1:

Parent company — Santa Fe Industries, Inc.

Subsidiary companies —

Advertising Directions, Inc.
Alameda Belt Line
B & C General Agency, Inc.
The Belt Ry. Co. of Chicago
Central California Traction Co.
The Clinton and Oklahoma Western R. R. Co.
The Denver Union Terminal Ry. Co.
The Dodge City and Cimarron Valley Ry. Co.
Fresno Interurban Ry. Co.
Gallo Wash Coal Company
The Garden City, Gulf and Northern R. R. Co.
Global Security Company, Inc.
The Gulf and Inter-State Ry. Co. of Texas
Gulf Central Pipeline Co.
Gulf Central Storage and Terminal Co.
Gulf Central Storage and Terminal Co. of Nebr.

hereinafter referred to as "Santa Fe", was indicted in March of 1979 for fifty (Counts 1 through 50) alleged violations

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Haystack Mountain Development Co.
Hospah Coal Company
Houston Belt & Terminal Ry. Co.
Joliet Union Depot Co.
Kansas City Terminal Ry. Co.
The Kansas Southwestern Ry. Co.
Kirby Forest Industries, Inc.
Los Alamos Constructors, Inc.
Los Angeles Junction Railway Co.
McKee Development Services, Inc.
Robert E. McKee, Inc.
The Oakland Terminal Railway
Oklahoma City Junction Railway Co.
Pintada Coal Company
The Pueblo Union Depot and R. R. Co.
The Pullman Company
Rio Grande, El Paso and Santa Fe R. R. Co.
St. Joseph Terminal R. R. Co.
San Diego Pipeline Co.
Santa Fe Energy Co.
Santa Fe Energy Co. of Seychelles, Inc.
Santa Fe Energy Products Co.
Santa Fe Forwarding Company
Santa Fe Industrial Realty Co.
Santa Fe Industries, Inc.
Santa Fe Land Improvement Co.
Santa Fe Mining, Inc.
Santa Fe Natural Resources, Inc.
Santa Fe Oil Co.
Santa Fe Pacific R. R. Co.
Santa Fe Pipeline Co.
Santa Fe Pipelines, Inc. (Delaware)
Santa Fe Rail Equipment Company
Santa Fe Terminal Services, Inc.
The Santa Fe Trail Transportation Company
Santa Fe Transportation Co. (California)
Security Guard Service, Inc.
Southwest Pipe Line Company
Standard Office Building Corporation
Star Lake Railroad Company
Sun Country Construction Co.
Sunset Railway Co.
Texas City Terminal Ry. Co.
Toledo, Peoria & Western Railroad Co.
Trailer Train Company
Walker-Kurth Lumber Co.
The Wichita Union Terminal Ry. Co.
The Zia Company

of the Elkins Act, 49 U.S.C. §41(1). The case was prosecuted in the District Court for the Central District of California pursuant to 49 U.S.C. §41(1). Said Act, as relevant here, prohibits a railroad from knowingly granting a shipper a rebate or concession from the rate established in tariffs published and filed with the Interstate Commerce Commission, hereinafter referred to as "ICC".

The conduct which allegedly constituted the violations was not disputed: Santa Fe provided temporary California licenses (referred to as 5-day trip permits) on rail owned or rail controlled "piggyback" trailers which had moved via rail transportation from points in the East and Midwest to Los Angeles, California, during the year 1975. As to the fifty trailers cited in the fifty counts, each was a rail owned or rail leased trailer which was licensed in a state other than California. Before foreign-licensed trailers, such as those cited in the Indictment, may be operated on the streets and highways of this state, California requires that the same must be registered and licensed in California (Vehicle Code §§6850, 6853) unless exempted by a reciprocity agreement with another state (Vehicle Code §§6852 and 8000(f)). Thus, the trailers cited in the 50 count Indictment could not legally leave the rail yard until they were registered and licensed in accordance with provisions of the Vehicle Code. This requirement was, in those instances, satisfied by the application of temporary 5-day permits costing $5.00, as authorized by Vehicle Code §§4004, 9260.

The mode of transportation with which we are here concerned was railroad trailer-on-flat-car (TOFC) service or "piggyback" service. It is nothing more than a hybrid form of transportation whereby a truck trailer is loaded at the origin by the shipper, moved over the highway to a railhead where it is loaded on a railroad flat car. Thereafter, the trailer moves from rail origin to rail destination where it is

removed from the flatcar. Finally, highway transportation is utilized to deliver the trailer to the ultimate destination for unloading.

There were four main variations of the TOFC, or piggyback mode of transportation in existence in 1975. The mode with which we are here concerned is referred to as *Plan IV* and was established and available pursuant to certain tariffs published and on file with the ICC. Plan IV is distinguished, in part, from the other variations by the requirement that the shipper must make arrangements for the drayman, that is, driver and tractor, for the over-the-highway transportation of the trailer at origin and destination. The pertinent tariff provisions were Item 6950 series and Item 1072 series.

Item 6950-A (introduced into evidence as Exhibit 60.1 at trial) Supplement 2 to Tariff 1-X and Item 1072 of Freight Tariff 1-X, both of which were in effect on July 15, 1975, are those commonly referred to as Plan IV TOFC, although that terminology is not to be found in the tariff. Item 6950-A (set forth in entirety as Exhibit E herein) named a charge of $1344.43 on "freight, all kinds, in trailers and/or containers on flat cars," subject to various notes and cross references, expressly including Note 2.

Note 2 in Item 6950-A states in part: "(B) Rate includes the loading of trailers or containers on flat car by a rail carrier's permanent facilities provided for such operation and the unloading of trailers or containers from flat cars by the rail carrier at rail carrier's permanent facility provided for such an operation." Thus, the $1344.43 charge constituted the line haul transportation charge for moving trailers from the origin railhead to the destination railhead. This aspect of the transportation is often referred to as the "ramp-to-ramp" segment of the transportation.

It is emphatically noted at this juncture that the movement of the trailer out of the railroad yard is not a part of Item 6950-A line haul transportation charge nor is the provision of flat cars or trailers a part of the line haul transportation charge. Note 2 to Item 6950-A states: "(A) (Subject to Item 1072) Flat cars, trailers in containers shall be furnished by the shipper or his agent. All such equipment shall be approved by the railroad." In other words, subject to Item 1072, the ramp-to-ramp charge is for transportation of *trailers provided by the shipper on flat cars provided by the shipper*.

Item 1072 (set forth in entirety as Exhibit F hereto) states in part 1, under the heading "Trailers Furnished by Carrier,": "Carriers are not obligated to furnish trailers. However, where trailers as specified in Note 4 of Item 6950 are furnished by the carriers, the following additional charges will be assessed for each trailer furnished and will apply for one-way rail movement, subject also to the detention charges and rules herein provided." An accessorial charge is named in Item 1072 for each closed trailer or container furnished by the railroad. This is commonly known as the trailer lease charge. It is separate from, *and in addition to*, the line haul transportation charge named in Item 6950-A.

Part 2 of Item 1072, under the heading "Flat Cars Furnished by Carrier", states, in effect, that when the carriers furnished the flat car, an additional charge of $49.53 will be made. This is commonly known as the flat car rental charge. It is also a separate and additional charge.

To summarize, there are three different tariff charges which could be assessed against a shipper for moving trailers in Plan IV TOFC service. One (Item 6950-A) is for the line haul rail transportation of the trailers and flat cars. The second (Part 1, Item 1072) is for the rental of the trailers from the railroad if the shipper does not have his own. The

third (Part 2, Item 1072) is for the rental of the flat car if the shipper elects to use a railroad flat car. The three separate charges for the three separate services is apparent from the reading of the two tariff items referred to hereinabove and was apparent from the freight bills admitted into evidence at trial.

All of the trailers involved in the fifty counts of the Indictment were rail owned or rail leased trailers which were provided to the shipper pursuant to Part 1, Item 1072 and for which a separate rental charge was assessed.

It was the practice of Santa Fe during 1975, the period covered by the Indictment, that when trailers, rail owned or rail leased but provided to the shipper pursuant to a rental charge, arrived in California and were made ready for truck transportation, Santa Fe provided the 5-day trip permits. However, when *trailers owned by the shipper* arrived in California in Plan IV service, it was the responsibility of the shipper to provide the 5-day trip permit. Naturally, if a shipper rented a rail owned or rail leased trailer bearing *permanent California license plates*, no temporary permit was required or furnished.

Effective July 6, 1976, Santa Fe amended its terminal tariff, not Item 1072, to include the following item which expressly referred to the purchase of permits for rail carrier furnished trailers:

> When a carrier furnishes a trailer or trailers to a shipper for transportation in accordance with published tariff provisions and ATSF [petitioner] receives a line haul as the origin and/or destination carrier, it will provide proper licensing of such trailer or trailers for highway transportation to and/or from ATSF ramp location in Arizona or California or New Mexico. Such licensing may be temporary or permanent at the option of the ATSF. When temporary licensing is used only one

> such license will be provided at origin and/or destination.

Santa Fe Tariff 8117-Y, ICC 15317, Supplement 23, Effective July 6, 1976; Item 763.

Said Amendment as required by ICC regulations, was marked with a "▲" which signified that it was a "change in wording which results in neither increase nor reduction in charges." It was duly filed and published in accordance with ICC procedure and without objection thereto.

The United States contended that it was the shipper's obligation to pay for the temporary license which was applied to the railroad's trailer. Conversely, Santa Fe contended that temporary license, necessary for movement of the trailer on California highways, was an obligation to be borne by Santa Fe for which it was reimbursed through the rental charge paid by the shipper for the use of the trailer. The pivotal determination was whether Santa Fe was providing the trip permits and bearing the cost of $5.00 per trailer, as an incident and obligation of the transportation service rendered or whether Santa Fe was assuming the cost of the $5.00 permit and knowingly conferring a concession upon the shipper.

When it became apparent that a finding of violation of the Elkins Act would revolve, in part, around an interpretation and construction of the tariff and practical usage attached thereto, Santa Fe timely moved the District Court for a stay of proceedings in the criminal prosecution pending referral to the ICC of the question of whether the tariff contemplated that a railroad trailer leased to the shipper pursuant to the trailer leasing charge in Item 1072, should be licensed by the railroad. This motion was premised upon the doctrine of primary jurisdiction and recited that it was within the exclusive province of the ICC to resolve the question of tariff interpretation and construction. Santa Fe's

motion was denied without oral argument and the District Court further denied Santa Fe's Motion for Reconsideration without allowing oral argument.

When the matter proceeded to trial without preliminary interpretation of the tariff by the ICC, Santa Fe proposed to present evidence through an independent witness who was an ICC practitioner of considerable experience in interstate commerce tariff interpretation and application, as well as through petitioner's employees who were instrumental in the drafting of the tariff and its practical application. The relevance of this testimony was premised primarily upon the fact that the tariff in question, Item 1072, *made no reference whatsoever to the problem of licensing or whose responsibility that was*. Santa Fe made a further offer of proof supported by applicable case authority, *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922), to show the "usage of trade or locality" which attached provisions to the tariff not expressed in the language of the tariff. This usage of trade was that every transcontinental railway offering service under Plan IV to California and other states having temporary license requirements provided such licenses at railway expenses. Nevertheless, the District Court excluded all such evidence based on its conclusion that the tariff was not ambiguous and contained no "technical connotations".

During the course of the trial, the District Court concluded that the construction of the pertinent tariffs was a matter of law. However, at no time did the District Court actually interpret the tariff nor instruct the jury as to its interpretation of the tariff. Rather, the jury was provided with the tariffs which were introduced into evidence by the United States. Clearly, if interpretation of the tariffs was a matter of law, the failure to render any interpretation or construction of the tariffs was *a default* on the part of the District Court.

Similarly, Santa Fe, during the course of trial, made an offer of proof in support of evidence showing Santa Fe's good faith interpretation of the tariff. This was premised upon Santa Fe's intention to assert the defense of good faith as delineated in the decision of *Lehigh Coal & Nav. Co. v. United States*, 250 U.S. 556 (1919). The court sustained objections to such evidence and then, at the time of settling jury instructions, rejected Santa Fe's jury instructions pertinent to the defense of good faith interpretation.

After deliberation, the jury returned a verdict of guilty on 48 counts of violating the Elkins Act. Two counts had been dismissed by the District Court for technical inadequacies. Thereafter, the court entered judgment and imposed the following penalties: (1) fine of $5,000 per count on Counts 1 through 5 totaling $25,000; (2) fine of $20,000 per count on the remaining 43 counts for a total of $860,000, payment to be suspended during probation; and (3) probation for a period of three years on the terms that Santa Fe not violate any local, state or federal laws.

On appeal to the U.S. Court of Appeals for the Ninth Circuit, Santa Fe raised all of the issues stated above. In a three page Memorandum, included herein as Exhibit A, the Court of Appeals concluded that the question of construction of an interstate tariff is one of federal law and that where words of a tariff are used in an ordinary sense, preliminary resort to the ICC is unnecessary, citing *Great Northern Railway v. Merchants Elevator Company, supra*. The Court of Appeals also approved of the District Court's exclusion of the evidence pertaining to interpretation of the tariff on the grounds that there were no ambiguities or technical connotations in the language of the tariff. And, lastly, the District Court's refusal to admit evidence in support of the defendant's defense of good faith tariff interpretation was affirmed on the basis that violation of the Elkins Act,

being a *malum prohibitum* offense, did not require proof of evil intent as an element.

REASONS FOR GRANTING THE WRIT.

1. The Decisions of the Federal Courts Below in Refusing to Refer the Issue of Tariff Interpretation and Construction to the ICC Are in Conflict With the Decisions of This Court Regarding the Application of the Doctrine of Primary Jurisdiction of the ICC.

The special and important reason for granting the review of the lower court decisions is that the refusal of the District Court, affirmed by the Court of Appeals, to defer to the expertise and knowledge of the ICC in determining the issues of tariff interpretation and construction effectively nullifies the statutory purpose of the Commission, which is to decide issues of transportation policy and ensure uniform and expert administration of the regulatory scheme.

Although the province of the ICC has been discussed in several cases, the Court in *United States v. Western P. R. Co.*, 352 U.S. 59, 64 (1956), aptly observed that there is no fixed formula for applying the doctrine of primary jurisdiction of the ICC. However, that decision does identify and enunciate the two basic inquiries which must be made for determining whether a matter is within the exclusive and primary jurisdiction of the ICC. They are:

> [T]he first question presented is whether effectuation of the statutory purposes of the Interstate Commerce Act requires that the Interstate Commerce Commission should first pass on the construction of the tariff in dispute here; this, in turn, depends on whether the question raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act.

352 U.S. at 65.

As should be abundantly clear from the statement of the case, the answers to the aforequoted inquiries when applied

to the case at bar must be in the affirmative. The issue of licensing piggyback trailers, and at whose expense, is manifestly one of transportation policy. During the year in which the transactions cited in the 50 counts occurred, Santa Fe engaged in some 128,000 similar piggyback transactions. The magnitude of this number is enhanced considerably by the realization that at least three other major transcontinental railroads were providing piggyback service to West Coast states requiring temporary licenses. It was the practice among the railroads that the cost of temporary licenses was borne by the rail carrier on rail-owned or rail-leased trailers. There can be no question that such licensing was an issue of industry-wide significance and effect.

Similarly, it is apparent that the resolution of the question of licensing of out of state trailers, the responsibility for which is not expressly assigned within the applicable tariffs, is, *a fortiori*, a matter which cannot be evaluated by a district court or an appellate court in a vacuum of facts. Certainly such an interpretation requires a presentation of evidence, possibly conflicting and voluminous, which would require an acquaintance with transportation concepts and policy in order to adequately appreciate the ramifications thereof. The absence of such evidence or the inability to appreciate such evidence if it were presented, would obviously create the opportunity for a lack of uniformity and for inexpert administration of the regulatory scheme. This is graphically exemplified by two observations: (1) Both the Court of Appeals (page 2 of the Appendix) and the District Court (page 6 of the Appendix) thought the 5-day permits were applied to *customer-owned or provided trailers*, and (2) Santa Fe was found guilty of violating the Elkins Act for following a practical adaptation to the Plan IV tariffs — a usage which was adopted by every other transcontinental railroad con-

fronting the necessity for temporary licensing of foreign trailers.

The Court in *United States v. Western P. R. Co., supra,* observed that:

> [W]here the question is simply one of construction the courts may pass on it as an issue 'solely of law.' But where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that 'the enquiry is essentially one of fact and of discretion in technical matters,' then the issue of tariff-application must first go to the Commission. The reason is plainly set forth: such a 'determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.'

352 U.S. at 65-66 (Citing *Great Northern R. Co. v. Merchants Elevator Co.* 259 U.S. 285 at 291 (1922)).

It is respectfully submitted that the issue of tariff construction and application relevant to the licensing of trailers, by reason of the absence of tariff language and the potential for inexpert and non-uniform administration of the transportation mode, was within the exclusive primary jurisdiction of the Interstate Commerce Commission.

While the aforestated lack of uniformity and expert and consistent administration is readily apparent to Santa Fe, it may not be so apparent to the Court without a complete review of the record in this case. In this regard, this Court in *Great Northern R. Co. v. Merchants Elevator Co., supra,* while delineating the nice distinctions between whether a question of tariff construction was a matter within the jurisdiction of the district court or the ICC, also gave assur-

ances to litigants, such as Santa Fe, that there is a safeguard against the district court's improper construction of the tariff. That opinion assuages our concern by the following language:

> If the parties properly preserve their rights, a construction given by any court, whether it be Federal or state, may ultimately be reviewed by this court, either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured.

259 U.S. 290-91.

Such is the case at bar. The District Court affirmed by the Court of Appeals for the Ninth Circuit based upon *Great Northern R. Co. v. Merchants Elevator Co.*, did proceed with its own construction of the tariff. Now, Santa Fe, aggrieved by that construction, but having preserved the record, wishes to have this Court review the record on Writ of Certiorari to ascertain whether an expert and uniform construction of the tariff was accorded Santa Fe.

2. The Decisions of the Lower Courts to Exclude Evidence of Tariff Interpretation Showing Usage of Trade or Locality Are in Conflict With the Applicable Decision of This Court as Well as Other Federal Courts.

The District Court held that Santa Fe's evidence interpreting the tariff on the basis of trade usage and its technical meaning to railroads was inadmissible. The reason for this ruling was that the court could find "no colorable ambiguities or technical connotations" in the tariff and, therefore, to admit the evidence would intrude on the province of the jury. Exhibit C, p. 14. The Court of Appeals affirmed, stating that because there were no ambiguities or technical connotations the interpretation of the tariff was a matter of law. Exhibit A, p. 3.

These rulings ignore the opinion of this Court in *Great Northern R. Co. v. Merchants Elevator Co., supra*, in which the Court stated:

> [W]ords are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. *Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument.*

259 U.S. at 291-92 (Emphasis added.)

The extrinsic evidence offered by Santa Fe clearly established that a "usage of trade" had the railroads bearing the expense of the temporary license requirements of certain states, including California. Such evidence clearly demonstrated that railroads and shippers had attached a "peculiar meaning" to the tariff in spite of the fact that it, the tariff, may have appeared non-technical to the District Court. Manifestly, the exclusion of this evidence was error and prejudicial to Santa Fe.

This excluded evidence shows that the tariff is subject to more than one interpretation and the general rules of construing writings must be used to determine which interpretation is proper. The courts below failed to properly apply these well established rules which support the interpretation given the tariff by Santa Fe.

Both the District Court and Court of Appeals cite *Penn Central Co. v. General Mills, Inc.*, 439 F.2d 1338 (8th Cir. 1971), which gives a summary of the applicable rules. But the courts failed to even mention the rule most applicable to the present case:

> [A] strict construction of a tariff against a carrier is not justified where such a construction ignores a permis-

> sible and reasonable construction which conforms to the intentions of the framers of the tariff, *avoids possible violations of the law*, and accords with the practical application given by shippers and carriers alike.

439 F.2d at 1341 (Emphasis added).

The courts below have ignored the evidence supporting the reasonable and widely accepted interpretation of the statute and have given it an interpretation which has resulted in the criminal conviction of Santa Fe. By doing so, they have completely ignored the rule above and, therefore, misapplied the *Penn Central* case.

In a case in which it was called upon to interpret the language of a tariff, this Court has applied the rule that "where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law." *Great Northern R. Co. v. Delmar Co.*, 283 U.S. 686, 691 (1931).

The District Court, having decided that the tariff language was not subject to ICC interpretation, then excluded Santa Fe's extrinsic evidence as to the proper interpretation of the tariff. By ignoring and misapplying the rules of tariff interpretation, the District Court reached an interpretation which resulted in Santa Fe's conviction. The Court of Appeals affirmed with virtually no discussion. Such rulings by the lower courts are diametrically opposed to applicable rulings of this Court and must, therefore, be reviewed pursuant to Writ of Certiorari.

3. The Lower Courts Decided the Issues of the Relevance of Good Faith Tariff Interpretation and the Applicability of a Defense Based Thereon in Direct Conflict With the Decision of This Court in *Lehigh Coal & Nav. Co. v. United States*, 250 U.S. 556 (1919).

At the commencement of the trial, counsel for Santa Fe apprised the District Court of Santa Fe's intention to assert the defense of good faith tariff interpretation premised upon the decision of *Lehigh Coal & Nav. Co. v. United States, supra*. At an appropriate time, while making an offer of proof in support of its case in chief, counsel for Santa Fe inquired whether the court's previous rulings precluded testimony relative to the defense that Santa Fe's interpretation of the subject tariffs was rendered in good faith. After the court's preliminary remarks, Santa Fe made a substantial and explicit offer of proof as to proposed testimony of that issue. Nonetheless, the court sustained the government's objection as to the entirety of such testimony. Similarly, while settling the jury instructions after the taking of evidence had been completed, Santa Fe presented proposed instructions as to the defense of good faith tariff interpretation premised upon the *Lehigh Coal* opinion. The government serially objected to said instructions and the court sustained said objections.

In its Memorandum of Decision, the Court of Appeals for the Ninth Circuit, in affirming the District Court, concluded that violation of the Elkins Act, being a *malum prohibitum*, rather than a *malum in se* offense, did not require proof of evil intent as an element of the charge, citing *Armour Packing v. United States*, 209 U.S. 56, 69-72 (1908); *Union Petroleum Corp. v. United States*, 376 F.2d 569, 573 (10th Cir.), *cert. denied* 389 U.S. 838 (1967).

The action of the District Court and the Court of Appeal in regard to the defense of good faith interpretation of the tariff was in direct contravention of the precepts enunciated in *Lehigh Coal & Nav. Co. v. United States, supra.*

At trial on prosecution for violation of the Elkins Act, Lehigh presented evidence to support its defense that, although cognizant of the tariff allowance accepted, it had not "knowingly" accepted a rebate within the meaning of the Elkins Act because it had acted in good faith and in the honest belief that it was complying with the tariff. At the close of trial, the trial court concluded that Lehigh's honest belief that the allowance was permitted by the tariff was no defense since (1) Lehigh knew the contents of the tariffs and (2) the allowance was actually received by Lehigh. As a consequence, the trial court struck such evidence and refused to submit the question of good faith tariff interpretation to the jury on the holding that the defendant could not assert the defense of good faith and honest belief because it [Lehigh] "knew the contents of the tariffs, and knew also that the allowance was actually made and received." 250 U.S. at 562.

On a review pursuant to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, this Court held that the defendant had the right to show that the allowance was received in honest belief and that in receiving it, defendant was not disregarding what it believed to be the provision of the tariff. Implicit in this holding was that the district court further erred in refusing to submit the question of good faith to the jury. It was observed that:

> The misunderstanding was induced by practice and the opinion of those of authority that the act was complied with; and the word 'knowingly', therefore, as we have already indicated, must be considered and given exculpating effect if error there was.

250 U.S. at 566.

It is true that in the *Lehigh Coal* case, defendant was a shipper rather than the carrier. It is also true that there the defendant was not responsible for drafting the tariff whereas here, petitioner Santa Fe participated with other transcontinental railroads in the drafting of said framework. However, none of those differences serve to abrogate the exculpatory effect of the word "knowingly" in the Elkins Act language as established in the *Lehigh Coal* case.

The Court of Appeals, refusing to apply *Lehigh Coal*, relied on the only case to cite the *Lehigh Coal* opinion — *Union Petroleum Corp. v. U.S., supra*. But the appellate court in *Union Petroleum* failed to distinguish *Lehigh Coal* and certainly could not overrule it. That court, as did the appellate court in the present case, rejected *Lehigh Coal* in favor of *Armour Packing Co. v. U.S., supra*, which was decided *prior* to *Lehigh Coal* and prior to the insertion of the word "knowingly" in the Elkins Act.

This Court has never expressly overruled the *Lehigh Coal* opinion, nor can it be said to have been overruled *sub silentio*. The District Court sees support for its holding in *Union Pacific R. Co. v. U.S.*, 313 U.S. 450 (1941), and *U.S. v. Braverman*, 373 U.S. 405 (1963), but neither of these cases involved tariff interpretation. Thus, *Lehigh Coal* remains the most recent statement of this Court on the application of the Elkins Act where the defendant's "crime" was following a good faith interpretation of a tariff. As such, it was error for the District Court to exclude Santa Fe's evidence of good faith interpretation of the tariff and to refuse to instruct the jury on the defense of good faith interpretation. The Court of Appeals erred in ignoring *Lehigh Coal* and affirming the judgment of the District Court.

Conclusion.

The seriousness of any criminal prosecution should require the courts to fairly apply the controlling law. The courts below have misapplied and ignored the controlling decisions of this Court. In order that justice be afforded the Santa Fe and that the decisions of this Court be properly followed, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

EXHIBIT A.

Memorandum

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellee, v. The Atchison, Topeka and Santa Fe Railway Company, Appellant. No. 80-1106.

Appeal from the United States District Court for the Central District of California.

Before: PREGERSON, NELSON, Circuit Judges and TURRENTINE,* District Judge.

Filed: Oct. 10, 1980.

On May 21, 1979, defendant The Atchison, Topeka and Santa Fe Railway Company, a corporate common carrier, was indicted for fifty violations of the Elkins Act, 49 U.S.C. § 41(1). The indictment charged that defendant "knowingly offered and granted concessions" which "caused property to be transported at a rate less than that named in the tariffs published and filed by defendant . . . with the Interstate Commerce Commission." On January 17, 1980, defendant was found guilty on all but two of the fifty counts.

The evidence established that throughout 1975 defendant railroad furnished State of California Department of Motor Vehicles trip permits to its customers. Trip permits are short-term licenses for operation of vehicles beyond the railroad ramp area (i.e., on highways) for a five day period. These $5.00 permits are required under California law for truck trailers not permanently registered in California. Defendant provided the permits without separate charge to its shipper-customers for traffic moving under a "Plan IV" tariff. "Plan IV" transportation is a type of trailer-on-flat-car

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*The Hon. Howard B. Turrentine, District Judge for the Southern District of California, sitting by designation.

(TOFC) service in which the railroad receives customer-owned or leased truck trailers at the point of origin ramp and places the trailers on railroad flatcars for transportation to the destination, where the trailers are unloaded into the ramp area. The customers then pick up the trailers, attach them to tractors, and move them onto the highway for transportation to the final destination. Under "Plan IV" the defendant's responsibility ends at the ramp area.

Defendant amended its tariff on July 6, 1976 to specifically permit defendant to pay for the permits on behalf of its shippers. There is no dispute that prior to this date defendant paid for the permits in the instances for which it was convicted, as well as on hundreds of thousands of other occasions.

The Elkins Act imposes criminal liability on carriers which fail to strictly adhere to the terms of the applicable published tariffs. The Act expressly prohibits carriers from granting, and shippers or their agents from receiving, concessions which deviate from the published rates. 49 U.S.C. § 41(1). There is also a conclusive presumption that any deviation from the tariff rate filed with the ICC constitutes a criminal violation of the Act. 49 U.S.C. § 41(1).

The defendant contends that the trial court committed prejudicial error for the following reasons:

1. The court failed to grant defendant's motion to stay proceedings and refer the matter to the ICC for resolution.

2. The court improperly excluded evidence regarding construction of the tariff.

3. The court ruled construction of the tariff was a matter of law.

4. The court failed to properly instruct the jury on the question of tariff interpretation.

5. The court did not permit defendant to prove that its interpretation of the tariff was in good faith.

Defendant contends the permit issue is within the primary jurisdiction of the ICC because of the necessity for uniformity in tariff interpretation, and that the Commission should be required by court order to consider the question before a criminal prosecution may commence. The question of the construction of an interstate tariff is one of federal law. Where words are used in their ordinary sense preliminary resort to the ICC is unnecessary. *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 290 (1922).

At trial the defendant offered expert testimony for the purpose of interpreting the tariff to mean that the permit fees were included. In excluding the tendered evidence the court correctly held that the interpretation of the tariff was a matter of law and that there were "no colorable ambiguities or technical connotations in the language of the tariff." *See Penn Central Co. v. General Mills, Inc.*, 439 F.2d 1338, 1340-41 (8th Cir. 1971).

The trial court refused to admit evidence in support of defendant's defense of good faith tariff interpretation. It is clear that the Elkins Act created a malum prohibitum rather than a malum in se offense. Proof of evil intent is not an element of a charge under the Elkins Act. *Armour Packing Co. v. United States*, 209 U.S. 56, 69-72 (1908); *Union Petroleum Corp. v. United States*, 376 F.2d 569, 573 (10th Cir.), *cert. denied*, 389 U.S. 838 (1967).

The judgment below is affirmed.

EXHIBIT B.
Order.

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellee, vs. The Atchison, Topeka and Santa Fe Railway Company, Appellant. No. 80-1106.

Before: PREGERSON and NELSON, Circuit Judges and TURRENTINE,* District Judge.

Filed: Jan. 26, 1981.

Appellant's petition for rehearing is denied.

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*The Hon. Howard B. Turrentine, District Judge for the Southern District of California, sitting by designation.

EXHIBIT C.

Memorandum of Decision and Order.

United States District Court, Central District of California.

United States of America, Plaintiff, v. The Atchison, Topeka & Santa Fe Railway Co., a corporation, Defendant. No. CR 79-437-RJK.

Filed: Mar. 12, 1980.

The Court has before it three motions filed by defendant: *Motion for Arrest of Judgment, Motion for Judgment of Acquittal, and Motion for a New Trial.* Each motion is directed to a guilty verdict, after trial of defendant, on forty-eight counts charging violations of the Elkins Act, 49 U.S.C. § 41(1). These motions present essentially two issues for consideration by the Court: first, whether the Court may properly upset a guilty verdict in a criminal prosecution for tariff violations where, upon applying the terms of the relevant tariff to the behavior in question, the jury made the factual determination that defendant's payment of certain license fess for trailers shipped on its cars constituted a "concession" within the meaning of the Elkins Act, causing property to be transported by defendant at a rate less than that stated in the governing tariff; second, whether good faith or lack of evil intent are defenses to a *malum prohibitum* crime such as this.

I. *Statement of Facts.*

On May 21, 1979, defendant The Atchison, Topeka and Santa Fe Railway Company, a corporate common carrier, was indicted for fifty violations of the Elkins Act, 49 U.S.C. § 41(1). The indictment charged that defendant "knowingly offered and granted concessions" which "caused property to be transported at a rate less than that named in the tariffs

published and filed by defendant THE ATCHESON [sic], TOPEKA AND SANTA FE RAILWAY COMPANY with the Interstate Commerce Commission." On January 17, 1980, defendant was found guilty on Counts 1 through 21, 23 through 29, and 31 through 50 of the indictment.

The evidence established that throughout 1975 defendant railroad furnished State of California Department of Motor Vehicles trip permits, i.e., short-term licenses for operation of vehicles, free of charge to defendant's shipper-customers for traffic moving under a "Plan IV" tariff. "Plan IV" transportation is a type of trailer-on-flat-car (TOFC) service in which the railroad receives customer-owned or -leased truck trailers at the point of origin ramp and places the trailers on railroad flatcars for transportation to the destination, where the trailers are unloaded into the ramp area. The customers then pick up the trailers at the ramp area, attach them to tractors, and move them onto the highway for transportation to the final destination. The Plan specifically provided that defendant would only move the trailers to its railyard; defendant was not responsible for the transportation of the trailer from its yard to the final destination. Under California law, unless the trailer is permanently registered in California, a Department of Motor Vehicles permit is required for any movement of the trailer beyond the ramp area. The so-called "trip permits" in question here were in the amount of $5.00 per trailer, permitting highway operation for a five day period.

Defendant has never disputed the fact that it paid the $5.00 trip permit charge on behalf of its shippers in the forty-eight instances for which it was convicted, as well as in the hundreds of thousands of other instances in which it shipped trailers on its flatcars before July 6, 1976 when apparently in recognition of a prior omission in its tariff, defendant amended its tariff to specifically permit defendant

to pay for such permits. The tariff relevant to this prosecution is published by the Transcontinental Freight Bureau, to which defendant is a party. The tariff, whose applicability defendant does not dispute, defines the service to be rendered by defendant railroad as ramp-to-ramp transportation, and it contains no provision permitting defendant to furnish the trip permits:

> "Rate includes the loading of trailers or containers on the flat car by the rail carrier at rail carrier's permanent facilities provided for such operations and the unloading of trailers or containers from the flat car by the rail carrier at rail carrier's permanent facilities provided for such operations (does not include facilities for interchange with common or charter carriers of any type)."
>
> TCFB Tariff I-X, ICC 1912, Effective July 15, 1975, Item 6950, Note 2(B).

Effective July 6, 1976, defendant amended its tariff to include the following item which expressly authorizes defendant to purchase permits on behalf of shippers:

> "When a carrier furnishes a trailer or trailers to a shipper for transportation in accordance with published tariff provisions and ATSF [defendant] receives a line haul as the origin and/or destination carrier, it will provide proper licensing of such trailer or trailers for highway transportation to and/or from ATSF ramp location in Arizona or California or New Mexico. Such licensing may be temporary or permanent at the option of the ATSF. When temporary licensing is used only one such license will be provided at origin and/or destination."
>
> Santa Fe Tariff 8117-Y, ICC 15317, Supplement 23, Effective July 6, 1976; Item 763.

Defendant was convicted here of acts committed in 1975 when the earlier tariff was in effect.

II. *Applicable Criminal Statute.*

The Elkins Act, 49 U.S.C. § 41(1), imposes criminal liability on carriers which fail to strictly adhere to the terms of the applicable published tariffs. The act expressly prohibits carriers from granting, and shippers or their agents from receiving, concessions which deviate from the published rates:

> "The willful failure upon the part of any carrier subject to [the Interstate Commerce Act] to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,00 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act. . . whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carriers, as is required by said Act . . . or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concessions, or discrimination shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000. . . ."

The Elkins Act also creates a conclusive presumption that any deviation from the tariff rate filed with the Interstate Commerce Commission constitutes a criminal violation of the Act:

> "Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the [Interstate Commerce] Act . . . or participates in any rates so filed or published, that rate as against such such carrier, its officers or agents, in any prosecution begun under sections 41, 42 or 43 of this title shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed an offense under this section." 49 U.S.C. § 41(2).

As the U.S. Supreme Court commented on 49 U.S.C. § 41(1) in *United States v. Braverman*, 373 U.S. 405, 406, 83 S.Ct. 1370, 1371 (1963): "More unequivocal language would be hard to imagine. It strikes at *any and every kind of rebate*, no matter by whom or to whom given." (emphasis supplied) In reviewing the legislative history of the Elkins Act, the *Braverman* court noted that the House Committee on Interstate and Foreign Commerce, in its favorable report on the bill which became the Elkins Act, observed that "it was 'practically impossible to show the discrimination' and recommended passage of its proposal making it 'a penal offense to make any departure from the published rates whether there be a discrimination or not.' [citation omitted]" 373 U.S. at 407, 83 S.Ct. at 1372. The *Braverman* court then analyzed the philosophy underlying the Elkins Act:

> "We have considered the statute before us in light of the salutary rule that criminal statutes should not by interpretation be expanded beyond their plain language. [citation omitted] But neither can we interpret a statute so narrowly as to defeat its obvious intent. [citation omitted] Congress, the [Interstate Commerce] Commission, and the public were so concerned to make certain that, once a tariff had been published, *no deviations whatever* from that tariff would take place.

> *Nowhere can we find support for the suggestion that some departures were to be checked while others were to be allowed.* We would ignore the express language of the Elkins Act, the economic ills which gave rise to its passage, the objects which the framers of the statute had in mind, and the subsequent judicial enforcement of the Act if we limited its operation to only some kinds of rebates or to only some people. *Congress wanted rates to be published and honored. It wanted rebates stopped.* It used fitting language to accomplish that end." 373 U.S. at 408-409, 83 S.Ct. at 1372. [emphasis supplied]

Accordingly, *Braverman* broadly construed the Elkins Act to hold that an offense was stated where the indictment charges that a person has solicited a rebate from a common carrier regarding the transportation in interstate commerce of a shipper's property, even though it is not alleged that the rebate was for the benefit of the shipper. The advertised and proffered preference in our case is within the rule announced in *Braverman*.

III. *Motion for a New Trial.*

Defendant predicates its motion for a new trial on the following grounds: that the Court erred in excluding expert testimony by defense witnesses regarding proper interpretation and application of the relevant tariff; that the Court erred in charging the jury as to the definition of a "concession" and as to the proper guidelines for tariff interpretation and in refusing to charge the jury regarding a defense of good faith interpretation of the applicable tariff; that the verdict was contrary to the weight of the evidence and was unsupported by substantial evidence; and finally, that the Court erred in refusing to stay these criminal proceedings pending referral of the tariff interpretation issues to the Interstate Commerce Commission.

As to defendant's first argument — that the Court erred in barring defense evidence regarding the proper interpretation and application of the tariff in question — no cases have been cited by either party which interpret the language of the tariff in question. However, certain well-established rules of tariff construction have been generally adhered to be [sic] the courts. In *Penn Central Company v. General Mills, Inc.*, 439 F.2d 1338, 1340-1341 (8th Cir. 1971), the Eighth Circuit discusses a number of appropriate guidelines and the established authority from which they arise. First, where no issue of fact is present and the words of the tariff are used in their ordinary meaning with no particular connotation within the field of expertise of the Interstate Commerce Commission, then the interpretation of a tariff ordinarily presents a question of law. Second, a tariff is no different from any other type of contract, and hence its true application must sometimes be determined by the factual context upon which it is to be impressed. Third, in the interpretation of a tariff, the words of the tariff must be construed in accordance with their generally-accepted usage and meaning. Fourth, the tariff should be strictly construed against the carrier since it is the carrier who drafted the tariff; accordingly, any doubt or ambiguity should be resolved against the carrier. Fifth, such ambiguity or doubt must be a substantial and reasonable one and should not be the product of an undue straining of the tariff's language. Sixth, published rules relating to tariffs must have a reasonable construction and should be interpreted in such a way as to avoid unfair, unusual, absurd, or improbable results.

As to defendant's claim that extrinsic evidence was necessary to guide the jury's interpretation and application of the tariff here, the crucial question is whether, in light of the well-recognized rules of tariff interpretation discussed

above, the relevant tariff (TCFB Tariff I-X, ICC 1912, Effective July, 1975) contains words which are used in their ordinary meaning — as opposed to a technical connotation elusive to the average person — or otherwise contains significant ambiguities regarding the responsibility of defendant railroad to provide trip permits free of charge to shippers as part of its basic rail transportation service.

The tariff clearly states that the transportation service offered by defendant railroad is on a "ramp-to-ramp" basis, with the responsibility for transportation of the trailers beyond the ramp area resting with the shipper or its agent. As the government notes, to imply otherwise — that is, to imply from the tariff a duty to perform an addition or service or pay for a post-ramp necessity (the permit) not explicitly called for by the tariff's express terms — would be to place a strained, unnatural construction on the tariff. Rather than attempting to delineate all possible permissible and impermissible kinds of services to be offered by the railroad, the tariff delineates the railroad's obligations on a "geographic" basis: the tariff describes the physical point at which the railroad's duties of service begin (the ramp at the place of origin of the shipment) and the point at which the duty of service ends (the ramp at the place of destination). In essence, then, there are three stages in the transportation process here: shipment of the cargo on the highway for delivery at the ramp area of defendant railroad; shipment of the trailer on the flat cars; and transportation of the trailer from the railroad ramp area to the ultimate destination, again on the highway.

On the basis of this rather simple geographic delineation of defendant railroad's duty of transportation service provided in the applicable tariff, the jury could quite readily conclude that the trip permits related to the last leg of the trailer's transportation when it was attached to a tractor and

driven on the highway. As the *Braverman* court noted, the Elkins Act unequivocally bars *any* deviation from the published rate; any such deviation is conclusively presumed to constitute a criminal violation. The confines of permissible transportation service under the geographic model employed in the tariff here are set forth in an equally simple fashion. By providing free of charge an additional, non-rail-transportation service affecting the highway leg of the transportation process, defendant railroad effectively transported the trailers for an amount less than the published, legal tariff rate. In an analogous case involving the furnishing of warehouse services by a railroad, *Baltimore & O. R. Co. et al. v. United States et al.*, 305 U.S. 507, 523-524, 59 S.Ct. 284, 290 (1939), the U.S. Supreme Court noted:

> "... a saving on the non-transportation services obviously figures out the same as a rebate on the transportation service. It is immaterial that the shipper pays fair value or the market price for the extra privilege he enjoys. Section 6(7) of the [Interstate Commerce] Act forbids the carrier to receive less than the published rates for transportation or to remit 'by any device any portion of the rates.' When services, not necessary for transportation, are furnished below cost in an effort to acquire rail transportation, as was done here, this provision is violated."

In the case at hand, defendant Santa Fe provided an additional non-rail-transportation service free of charge by paying the shipper's license fees in California.

In short, then, a side-by-side comparison of the language of the governing tariff with the description of the illegal acts — defendant railroad's payment of the $5.00 trip permit license fee — simply points up no colorable ambiguities or technical connotations in the language of the tariff. Accordingly, acceptance into evidence of expert and lay opin-

ion testimony regarding the appropriate interpretation and application of the tariff would have constituted an unwarranted intrusion into the province of the jury in its application of the governing tariff to the factual context at hand.

Defendant Santa Fe further asserts that it did not *knowingly* grant a concession to its shipper-customers, thereby causing property to be transported at a rate less than the published, lawful tariff rate, in violation of the Elkins Act. Accordingly, defendant asserts that the Court erred in failing to instruct the jury on a defense of good faith interpretation of the relevant tariff; defendant further asserts that the record is absolutely devoid of evidence that defendant "knowingly" granted a concession in violation of the statute. Defendant's position essentially is that a good faith interpretation, or even misinterpretation, of the tariff is a defense to an Elkins Act prosecution.

Defendant relies primarily upon *Lehigh Coal & Navigation Co. v. United States*, 250 U.S. 556, 40 S.Ct. 24, 63 L.Ed. 1138 (1919) which, according to defendant, overturned the conviction of a defendant for an Elkins Act violation because the trial court had refused to permit defendant therein to present evidence of its good faith interpretation of the applicable tariff. However, *Lehigh Coal* is clearly distinguishable from the case at hand. In *Lehigh Coal*, the defendant had taken certain actions in reliance upon the sanction of the Interstate Commerce Commission that such behavior comported with the applicable tariff. As the Court held: "The misunderstanding was induced by practice and the opinion of those in authority that the act was complied with and the word 'knowingly' therefore, as we have already indicated, must be considered and given exculpatory effect if error there was." 250 U.S. at 566, 40 S.Ct. at 26. In the case at hand, the Interstate Commerce Commission did not sanction defendant's payment of the trip permits, but indeed

an ICC representative, on several occasions before the tariff was amended, informed defendant that its actions were improper and in likely violation of the Elkins Act. In addition, *Lehigh Coal* involved prosecution of a shipper for acceptance of concessions, whereas here defendant carrier drafted the tariff and is, correspondingly, held to a higher standard of knowledge of it.

The government relies upon *Armour Packing Co. v. United States,* 209 U.S. 56, 28 S.Ct. 428, 52 L.Ed. 681 (1907), which held that: "The stipulated facts show that the shippers had knowledge of the rates published, and shipped the goods under a contention of their legal right so to do. This was all the knowledge or guilty intent that the act required." 209 U.S. at 86, 28 S.Ct. at 437. Although *Armour* was decided prior to the insertion of the term "knowingly" into the Elkins Act, the Court here agrees with the view of the Tenth Circuit regarding this change in the Elkins Act, as expressed in *Union Petroleum Corporation v. United States,* 376 F.2d 569, 573 (10th Cir. 19679), *cert. denied,* 389 U.S. 838 (1967): "We do not think that this amendment alters the fundamental principle that one's mistaken understanding of the law does not constitute a defense. [citations omitted]. Furthermore, the term 'knowingly' imports merely perception of the facts necessary to bring the questioned activity within the prohibition of the statute. The term does not require as a part of its meaning that there necessarily be knowledge or awareness that such activity is in fact prohibited. [citation omitted]." The Fourth Circuit voiced a similar view in *Powell v. United States,* 112 F.2d 764, 767 (4th Cir. 1940), which upheld an Elkins Act conviction: "In any event, the charging of a lower rate than the one properly applicable was wilful within the meaning of the statute, in that it was the intentional doing of an act which the statute forbade. It is well-settled that the use in the act

of the word 'wilful' does not require that there be an evil intent to commit the offense, but that it is sufficient if the act was done knowingly."

This standard finds support in *Union Pac. R. Co. v. United States*, 313 U.S. 456, 61 S.Ct. 1064 (1941), which involved an Elkins Act prosecution and was decided after *Armour, Lehigh Coal*, and the 1906 amendment inserting "knowingly" into the Elkins Act. In *Union Pac. R. Co.*, the U.S. Supreme Court reiterated the well-established view that: "Violations of the commerce acts through receipt of advantages is to be tested by *actual results not by intention*. [citation omitted] *Any and all means to accomplish the prohibited end are banned*. [Citation omitted]." 313 U.S. at 462, 61 S.Ct. at 1071 [emphasis supplied]." Good faith interpretation or misinterpretation not being a defense to prosecution for violation of the Elkins Act, there was no error in refusing to charge the jury as to such a defense.

In addition, the Court finds that the government met its burden of proving the "knowledge" element of an Elkins Act violation. In both its motion for new trial and judgment of acquittal, defendant argues that the government failed to sustain its burden on this issue. In *Continental Shippers' Association v. United States*, 328 F.2d 966 (9th Cir. 1964), the Ninth Circuit stated that in reviewing a conviction under the Elkins Act, the reviewing court views the record in the light most favorable to the government. *See also Bolen v. United States*, 303 F.2d 870, 874 (9th Cir. 1962) ("While there is some conflict in the testimony, we must view the evidence in the light most favorable to the Government, including the reasonable inferences to be drawn therefrom. [citation omitted] If, viewed in this light, there is substantial evidence to support the jury's verdict, it must be sustained. [citation omitted].")

Applying the standard that the knowledge requirement in the Elkins Act merely refers to defendant's awareness of such facts as to enable it to charge the lawful rate, the evidence proffered by the government establishes that defendant had knowledge of sufficient facts to enable it to adhere to the terms of the tariff. The government offered into evidence defendant's trailer receipt contract which provides that the receiver of the trailer, and not defendant, shall pay for all state licenses. In addition, the government proffered internal correspondence between defendant's employees directing that payment of the trip permit fees be made on behalf of defendant's customers; defendant's employees then testified that, in accordance with these company orders, the trip permit fees were in fact paid. Having drafted the tariff, defendant carrier knew that its obligations for transportation service were defined on a ramp-to-ramp basis, with its responsibilities ending with the unloading of the trailer into the ramp area. Accordingly, in the absence of any evidence to the contrary, the jury was entitled to draw the reasonable inference that in 1975 defendant had sufficient perception of those facts necessary to bring the questioned activity within the prohibition of the Elkins Act — that is, the intentional doing of an act which the statute forbade; knowledge that the activity was prohibited was not necessary. Under the *Union Pac. R. Co.* standard, the actual result achieved was transportation of the trailers at a rate less than the published tariff rate, and hence sufficient evidence is present to sustain the conviction for the "knowing" grant of a concession.

As an additional ground in its motion for a new trial, defendant contends that the Court improperly charged the jury as to the proper definition of a "concession" when the Court charged the jury as follows: "A concession is granted if the shipper obtains any advantage not provided for by

tariff.'' Defendant contends that the instruction is misleading in the sense that it focuses on ''any advantage,'' as opposed to equating the concession with ''receipt of transportation at less than the tariff rate.'' This argument is unconvincing. As noted above, *Braverman* prohibits *any* deviation from the published tariff rate and broadly construes the terms employed in the Elkins Act. Furthermore, the government points out that defendant's argument ignores the many references contained in other instructions given to the jury, which restated the requirement that defendant be found to have transported property at a rate less than that in the published tariff.

Finally, defendant contends that the Court should have stayed these criminal proceedings and referred the matter to the appropriate administrative agency, the Interstate Commerce Commission, for resolution. This argument is also unconvincing. Obviously in creating original jurisdiction in the federal courts to hear actions charging criminal violations of the Elkins Act, the Congress was well aware of the division of responsibility and expertise between the federal judiciary and the Interstate Commerce Commission. In so doing, Congress was equally aware of the fact that juries would be asked to apply the relevant tariff to the activity alleged to constitute a violation of the Elkins Act and to thereby determine whether criminal liability was present.

IV. *Motion for Judgment of Acquittal.*

In support of this motion, defendant raises a number of arguments: that the government failed to show that defendant's activities resulted in any kind of discriminatory treatment of shippers; that the government failed to prove that the cost of the trip permits was not implicitly included in the tariff charge assessed for rental of the trailers; and that

the government failed to show that defendant "knowingly" granted a concession in violation of the Elkins Act.

In *Braverman, supra,* the U.S. Supreme Court was quite explicit in holding that the gist of an Elkins Act violation lies in the *departure* from the published, lawful tariff rate. The Court reviewed the legislative history of the Act wherein the drafters indicated their intent to create " 'a penal offense to make any departure from the published rates whether there be a discrimination or not.' " 373 U.S. at 407, 83 S.Ct. at 1372. Thus, defendant's argument as to discriminatory treatment falls before established authority. Defendant's second argument in support of its motion is also unpersuasive: that the government failed to sustain the burden of proving that the tariff charge assessed for the rental of trailers under Plan IV did not provide implicitly for defendant's purchase of trip permits on behalf of its shipper-customers. The construction of the applicable tariff has been discussed at length above. The Court found the tariff to be clear upon its face. A jury could readily conclude that the activity in question was clearly barred by the ramp-to-ramp concept of service enunciated in the tariff, that defendant was providing a non-rail-transportation service free of charge, and hence that defendant was engaging in rail transportation service at a rate less than the lawful rate. Finally, as also discussed above, the jury could reasonably conclude that the government sustained its burden of proving that defendant knowingly committed an act which constituted a concession prohibited by the Act.

V. *Motion for Arrest of Judgment.*

Defendant predicates this motion upon the following grounds: that the indictment fails to state an offense in Counts 1, 7, 21, 24, 26, 36, and 37 in that the indictment fails to identify the person receiving the concession; that the

indictment alleging that defendant's concessions caused property to be transported at a rate less than that named in the tariff does not state an offense committed by defendant; and that prosecution under a criminal statute which affords no notice of criminally-proscribed conduct violates defendant's right to due process of law.

In its first argument, defendant contends that certain counts of the indictment are flawed in that the counts list the "receiver/consignee" as the party receiving the concession, as opposed to the actual shipper itself. This contention is without force. The Elkins Act itself refers to agents of a shipper, as well as the shipper itself. Additionally, the offense at which the indictment is directed is the *grant* of concessions by a carrier. *Braverman, supra,* broadly interpreted the kinds of parties who may be drawn within the Elkins Act in holding that an offense under the Act is stated when the indictment charges that a person has solicited a rebate from a common carrier regarding interstate shipments, *even though the indictment does not allege that the rebate was for the benefit of the shipper*. 373 U.S. at 409, 83 S.Ct. at 1372-1373.

Defendant's second argument is that the government failed to prove that property was transported at a rate less than that provided in the tariff and consequently failed to prove that defendant granted concessions. Defendant bases this contention on the stipulation by the parties that defendant collected applicable transportation charges on each of the shipments for which Elkins Act violations were charged. It was never disputed in this action that defendant collected the amount of money called for in the tariff for each shipment. However, no dispute existed that defendant provided a further service free of charge to its shippers — payment of the trip permit fee. Thus, although defendant nominally collected the full, lawful tariff rate, defendant's five dollar

payment rendered on behalf of its shippers for each shipment constituted an obvious reduction in the effective tariff rate.

Finally, defendant contends that this prosecution under a criminal statute which affords no notice of criminally-proscribed conduct violates defendant's right to due process of law. This contention is unpersuasive. As the *Braverman* court noted, the language of the Elkins Act could not be more unequivocal in barring *any* departure from the lawful tariff rate as published by the carrier. The Fourth Circuit rejected a similar challenge to the constitutionality of the Elkins Act in *United States v. North Carolina Granite Corporation,* 288 F.2d 232, 235 (4th Cir. 1961):

u503The defendant makes the additional contention that the penal statute [Elkins Act] on which the indictment is grounded is unconstitutional insofar as it is based on the tariff, since the term 'actual value' used in the tariff is too vague and uncertain to sustain a prosecution for crime. . . . There is no substance in this point. The uncertainty of which the defendant complains rests not in the meaning of the tariff but in the variety of circumstances to which it must be applied, a condition commonly encountered in applying a governing statute to the facts of a particular case."

VI. *Conclusion.*

Therefore, the Court finding that defendant's motions for a new trial, for judgment of acquittal, and for arrest of judgment each lack merit, it is ORDERED that each motion be and hereby is DENIED.

The Clerk of the Court shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: March 11, 1980.

/s/ ROBERT J. KELLEHER
Robert J. Kelleher
United States District Judge.

EXHIBIT D.

UNITED STATES CODE

TITLE 49

§ 41. Liability of corporation carriers and agents; offenses and penalties

Liability of corporation common carriers; offenses; penalties; jurisdiction

(1) Anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named

in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

EXHIBIT E.

Section 1 — Miscellaneous Commodity Rates.

Item 6950-A:

ARTICLES:

(Waiver Rules 4(c), 4(i), 7(a), 7(b) and 27 of Tariff Circular 20 authorized ICC Permission 73193 and ICC Permission 73-2040). Freight, all kinds, in trailers and/or containers on flat cars, subject to Notes 1 to 13, 17, 18, 19, 20, 22, 23, 28, 32, 33, 35, 36, 37 and 38 and Item 1071.

Trailers and/or Containers, empty, on flat cars, subject to Note 1(c) and Notes 2 to 12, 17, 18, 19, 28, 32, 35 and 36 and Item 1071.

FROM:

Chicago, IL; Kansas City, MO; Milwaukee, WI; St. Louis, MO.

TO:

Points shown in Note A.

RATES IN CENTS PER 100 LBS (Except as noted):

$1344.43.

RATE IN DOLLARS PER FLAT CAR:

NOTE A.-Points as follows:

Chico	CA	Los Angeles	CA
Concord	CA	Los Angeles Harbor	CA
East Portland	OR	Manteca	CA
East San Pedro	CA	①Modesto	CA
Eugene	OR	Phoenix	AZ
Long Beach	CA	Portland	OR
Longview	WA		
Reno	NV	Spokane	WA
San Diego	CA	Tacoma	WA
San Francisco	CA	Turlock	CA
San Jose	CA	Wilmington	CA

San Pedro ..... CA Woodland ..... CA
Seattle .....WA Yakima .....WA

NOTE 1.-

(a) APPLICATION OF RATES, subject to Note 16:

(1) Rate applies only when no one commodity or commodities in the same rate item in this tariff taking the same rate on the flat car exceeds {8 36,000 / 9 40,000} lbs, (Subject to subparagraph (1) of paragraph (b)). The weight of the lading at this charge shall not exceed 60,000 lbs. Weight in excess of 60,000 lbs, less the weight of contraband per sub-paragraph (1) of paragraph (b), will be rated at (NS12) 194 cents per 100 lbs.

(3) The weight of the lading in each trailer or container must not exceed 45,000 lbs. When a loaded trailer or container is found in transportation with lading in excess of 45,000 lbs. freight charges on lading in excess of 45,000 lbs in such trailer or container shall be collected on basis of Class 100 rate in effect in TCFB Tariff 1015-A, ICC 1688, on the actual weight of such excess over 45,000 lbs, not subject to readjustment of charges, and the charges, resulting from the use of such Class 100 rates shall be in addition to all other charges collected under the terms in this item.

(b) When a shipment is found in transportation not complying with the provisions of subparagraph (1) of paragraph (a) of this note, the following applies:

(1) The excess over {8 36,000 / 9 40,000} lbs, will be considered contraband and charges assessed thereon at rate of 526 cents per 100 lbs.

(c) INTERMEDIATE RULE:

(The provisions of Items 1500 and 1505 do not apply)

(1) (The provisions of this paragraph do not apply from points located north of the Ohio River and east of the Illinois-Indiana State Line, nor from points located south of the Ohio River and east of the Mississippi River, except will apply from Baton Rouge, LA, Memphis, TN, Natchez, MS, New Orleans, LA or Vicksburg, MS).

On shipments of loaded or empty trailers or containers moving under the provisions of this item from a point of origin not named in this item, which is directly intermediate from Chicago, IL, Kansas City, MO, Milwaukee, WI or St. Louis, MO, the charge to apply from such unnamed intermediate point will be the charge published herein from Chicago, IL, Kansas City, MO, Milwaukee, WI or St. Louis, MO.

(2) On shipments of loaded or empty trailers or containers moving under the provisions of this item to a point of destination not named in this item which is directly intermediate to points named in Note A, the charge to apply to such unnamed intermediate point will be the charge published herein to points named in Note A.

(d) When suitable flat cars are available at origin capable of handling trailers or containers with total length not exceeding 85 feet, rates and charges named in this item will also apply when consignor tendered trailers or containers consisting of one unit not exceeding 45 feet in length and one unit not exceeding 40 feet in length (Subject to Note 29) (exception to Note 2(C) and Note 4(B)). Participating carriers will not furnish trailers or containers exceeding 40 feet in length under the provisions of Part 1, Item 1072.

NOTE 2.-APPLICATION OF SERVICE:

(A) (Subject to Item 1072) Flat cars, trailers and containers shall be furnished by the shipper or his agent. All such equipment shall be approved by the railroad.

(B) Rate includes the loading of trailers or containers on the flat car by the rail carrier at rail carrier's permanent facilities provided for such operations and the unloading of trailers or containers from the flat car by the rail carrier at rail carrier's permanent facilities provided for such operations (does not include facilities for interchange with common or charter carriers of any type).

(C) Total length of Trailers or Containers (See Note 26) or both to be loaded or transported on one flat car shall not exceed $\{^{5}_{6}\ ^{80}_{81}\}$ feet in overall length.

NOTE 3.-DESCRIPTION OF COMMON CARRIERS TRANSPORTATION:

(A) All necessary packing and stowing of the goods in the container or trailer shall be performed by the shipper or his agent and transportation service authorized by this item does not include any service for packing, bracing or stowage of goods.

(B) Carrier shall not be required to furnish refrigeration, heating, ventilation, or other protective service (See Note 14).

NOTE 4.-SPECIFICATION FOR FLAT CARS, TRAILERS, AND/OR CONTAINERS:

Flat cars, Trailers and/or Containers furnished by the shipper must comply with the following specifications:

(A) The height and/or width above top of rail of the Trailer and/or Container when loaded on the flat car must not be in excess of the published clearances as prescribed over the route of movement in Railway Line Clearance unless otherwise authorized by the railroad.

Flat cars utilized under the provisions of this tariff will not be subject to Mileage Tariff 7, Agent J.F.Doyle's ICC H-32, and the railroad will not pay a mileage allowance to the owner of the flat cars.

(B) Trailer and Container specifications:

1. -Maximum length of trailer body or container to be not over 40 feet outside measurement.

2. -Maximum width of trailer body, container or load, 8 feet (outside measurement).

3. -Maximum tread (outside wall of tire to outside wall of tire) 8 feet, 6 inches.

4. -Maximum height of trailer or container, 13 feet 6 inches.

Closed trailers or containers must be equipped with closed side and/or end doors and such doors must be tightly fitted and have suitable locking and/or sealing devices on such equipment. Shipper must provide locks and/or seals to adequately secure the doors and protect the lading. Locks placed by shippers will be removed by consignee, and the carrier assumes no responsibility for the return.

Open-top or open-side trailers must have freight which is loaded therein properly secured and protected by tarpaulin or other adequate equipment.

Trailers must be in such condition as to comply with the carrier's rules regulating safe loading of trailers on flat cars and protection of equipment under the provisions of Rule 27 of Uniform Classification.

NOTE 5.-TERMS AND CONDITIONS:

When property is shipped at the rate herein, it is subject to terms and conditions stated in this item. A uniform bill of lading, in form prescribed by the Interstate Commerce Commission and shown in Uniform Classification, endorsed

"Shipper's load and count and shipper's weight", will be issued.

Such bill of lading must specify trailer and/or container number.

Shipper must certify on bill of lading the total weight of contents of each trailer or container and that contents of trailer and/or container do not violate provisions of this item.

A separate bill of lading will be issued for each flat car, except that when two or more cars are shipped on one day from one shipper served by one origin ramp point to one consignee served by one destination ramp point via one route, shipper may tender one bill of lading for the total number of flat cars shipped provided that the trailers and/or containers are matched or paired to constitute a flat car load and freight charges thereon will be assessed accordingly.

Rates will also apply on shipments of not more than two trailers tendered within two consecutive calendar days (See Note 30) from one shipper at one origin to one consignee at one destination on one bill of lading, subject to the provisions of Subparagraphs (a), (b) and (c) below:

(a) Both trailers of a two-trailer shipment must be delivered to the carrier's ramp or terminal within two consecutive calendar days (See Note 30) of each other.

(b) In tendering trailers under these provisions, shipper shall have given explicit consent to the carrier to load on the flat car or flat cars other trailers moving to the same destination ramp. As each trailer of a two-trailer shipment is delivered to the carrier's ramp or terminal location, sufficient shipping instructions (See Note 31) must be furnished to the carrier's agent to enable the carrier to forward each individual trailer independent of the other at carrier's convenience and only if there is another trailer available for

loading on the same flat car to same destination ramp. The charge for the two-trailer shipment will be the same as if the two trailers had been forwarded together on the same flat car. Trailers tendered under these provisions will under no condition be forwarded singly on a flat car to destination.

(c) In the event these provisions are not complied with charges on each trailer so shipped will be assessed on basis of actual weight subject to rates specified in Note 1, but not less than $1344.43 per trailer, in addition to all other applicable charges.

Shipper must either:

(a) Furnish for each bill of lading copies of manifest to the originating carrier within 24 hours, excluding Saturdays, Sundays and legal holidays (See Note 15), after the shipment reaches its destination, showing, subject to check and verification by carrier or its authorized representative:

(1) description of each article contained in the shipment and

(2) actual weight of each article contained in the shipment, or

(b) Provide certification in writing on bill of lading or shipping order, at time shipment is tendered, that the provisions of Item 6950, TCFB Tariff 1-X, ICC 1912 have been complied with, subject to check and verification by carrier or its authorized representative.

Rates in this item apply only on shipments for which the consignor or party in custody or control maintains shipper's records of sufficient completeness and accuracy to enable verification of correctness of entries on bill of lading or freight bill, or on certificates required herein, and upon request during business hours permits access for that purpose to carrier's agent or authorized representative. When such

shipper's records are maintained at origin or some other location other than destination, carrier's agent or authorized representative will also be permitted access upon request during business hours to whatever records or documents are available at destination, whether such records or documents are in the custody of consignor or his agent, consignee or his agent, or other party. If shipper's records are not of sufficient completeness and accuracy to enable verification of correctness, or if access is denied to carrier's agent or authorized representative, either to complete shipper's records or to whatever records or documents are available at destination, the rates named in this item do not apply and the shipment is subject to the Class 70 rate named in TCFB Tariff 1015-A, ICC 1688, applied on the total weight of the lading as defined in Note 1.

The Weighing and Inspection Bureau having jurisdiction is authorized to act as carrier's representative.

NOTE 6.-Rates do not apply on any of the following articles loaded in or loaded on trailers or containers:

Aninals, live.

Articles described under Rule 3 of Uniform Classification.

Articles as described in Items 92880, 92890, 92900, 93080, 93081, 93100 or 93110 of Uniform Classification.

Bulk Commodities.

Coal.

Coke.

Explosives as described in Classes A and B, Sections 173.53 through 173.93 of Agent R.M. Graziano's Tariff 27, ICC 27.

Fruits, fresh (not cold-pack nor frozen).

Game, Live,

Hides, Pelts or Skins, green salted.

Ice

Missiles, guided or Rockets, guided; Guidance Systems or Electronic Guidance Control Apparatus for installation in missiles or in missile sections; Missile or Rocket Frame Assemblies containing electronic apparatus, or Mobile Missile Guidance Control Systems, as described in Items 69093 through 69098 of Uniform Classification.

Motor Vehicles, frieght or passenger or combination of freight and passenger, complete or not complete, finished or not finished, except rates will apply on such motor vehicles when loaded in closed trailers.

Pigeons, live.

Poultry, live.

Radioactive Materials, as described in Items 80761 to 80768 of Uniform Classification.

Trailers, freight or tank as described in Item 6546.

United States Mail of any class.

Vegetables, fresh or green (not cold-pack nor frozen).

NOTE 7.-Transit privileges, other than reconsignment, will not be accorded in connection with shipments moving under the rates published in this Item (Subject to Item 185 of Western Railroads Rules Tariff 2-E, TCFB ICC 1906 of Trans-Continental Freight Bureau, Agent).

NOTE 8.-Shipments handled under this item by the ATSF are subject to the provisions of Item 560 of WTL Freight Tariff 457-I, ICC A-4910, supplements thereto or successive issues thereof, and where substituted service as authorized is performed, rates named herein will apply.

NOTE 9.-Shipments handled under this item by WP are subject to the provisions of Items 16715, 16780 and 16790 of WTL Freight Tariff 457-I, ICC A-4910, supplements thereto or successive issues thereof, and where substituted service as authorized is performed, rates named herein will apply.

NOTE 10.-Shipments handled under this item by SP are subject to the provisions of Item 13900 of WTL Freight Tariff 457-I, ICC A-4910, supplements thereto or successive issues thereof, and where substituted service as authorized is performed, rates named herein will apply.

NOTE 11.-Rates named herein to San Francisco, CA, include the movement of flat cars, from San Francisco to Oakland, Richmond or San Leandro, CA.

NOTE 12.-The provisions of Item 415 do not apply in connection with shipments moving under rate published in this item.

NOTE 13.-(a) (Provisions of this paragraph apply only in connection with the ③CNW, MILW, BN, PRTD, SOO or ③UP). Rates apply only on mixed carload shipments of two or more articles.

(b) (Provisions of this paragraph do not apply in connection with the ③CNW, MILW, BN, PRTD, SOO or ③UP). Rates apply only on mixed carload shipments of two or more commodities, with at least two of such commodities being named in different rate items.

NOTE 14.-Inspection of trailers containing freight requiring protective service will be subject to the provisions and charges published in Rule 815 of Perishable Protective Tariff 18, ICC 37. H.R. Brandl, Agent.

NOTE 15.-Legal Holidays are New Year's Day, Washington's Birthday, Memorial Day, see Note 24, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, except when a legal holiday falls on Sunday the following Monday will then be considered a legal holiday.

NOTE 16.-In applying the provisions of Note 1, the weight of commodities subject to actual or released values will be combined with the weight of the same commodities shown without such actual or released values. The combined

weight of such commodities will be treated the same as single commodity named in the same rate item.

NOTE 17.-Shipments handled under this item by BN are subject to the provisions of Items 2120 and 2140 of WTL Freight Tariff 457-I, ICC A-4910, and where substituted service as authorized is performed, rates named herein will apply.

NOTE 18.-Shipments handled under this item by SN are subject to the provisions of Items 12720 and 12780 of WTL Freight Tariff 457-I, ICC A-4910, supplements thereto or successive issues thereof, and where substituted service as authorized is performed, rates named herein will apply.

NOTE 19.-Shipments handled under this item by TS are subject to the provisions of Item 15800 of WTL Freight Tariff 457-I, ICC A-4910, supplements thereto or successive issues thereof, and where substituted service as authorized is performed, rates named herein will apply.

NOTE 20.-(Exception to Rule 11 of Uniform Classification):

(a) Except as provided in (b) below, charges shall be assessed on gross weight of contents of trailers and/or containers, excluding the weight of temporary flooring, blocking, racks, standards, stakes or similar bracing, dunnage or supports.

(b) When freight is prepared for shipment in conformity with packing requirements and, in addition, is loaded on pallets, platforms or skids, with or without standing sides or ends, but without tops, no charge will be made for the transportation of the pallets, platforms or skids, provided the shipper specified the weight of the pallets, platforms or skids on the bill of lading. (See Exceptions 1 and 2).

NOTE 22.-Shipments containing explosives or other dangerous articles are subject to Item 15.

NOTE 23.-Commodities shipped under the provisions of this item are subject to the same released valuation as provided in the Uniform Freight Classification. When more than one released valuation is provided for a commodity in the Uniform Freight Classification the lowest valuation for that commodity will apply as a released valuation when shipped under the rates authorized in this item.

The articles will be accepted for transportation at the rates named in this tariff provided the released valuation is entered on the shipping order and bill of lading in the following form:

The agreed or declared value of commodities included in this (carload or trailerload) shipment is hereby specifically stated by the shipper to be not exceeding the released valuation as provided for in the Uniform Freight Classification. When more than one released valuation is provided for any commodity included in this shipment in the Uniform Freight Classification the lowest valuation for that commodity will apply as a released valuation when shipped under rates authorized in tariffs making reference to Released Rates Order No. 1336 of September 27, 1972, as amended October 26, 1972.

_____

(Signature of Consignor)

When the foregoing statement is properly executed, the rates subject hereto will take precedence over all other rates not subject to released value, provided the released rates result in lower freight charges. If lower freight charges do not result, the released will be deemed not to have been executed and the rates subject hereto will have no application.

If the shipper fails or declines to execute the above statement or designates a value for the article exceeding that specified, the article will not be accepted for transportation at the rates subject hereto and rates published in other tariffs lawfully filed with the Interstate Commerce Commission will apply.

The released value shall be deemed to relate to the gross weight of each shipping package separately if shipped in packages or to each pound separately if shipped loose and not to the shipment as a whole. In case of loss or damage to a portion of the shipment, the amount recoverable will be the released value per pound multiplied by the weight of the lost or damaged portion, but not more than actual loss or damage.

Rates herein based on the released value have been authorized by the Interstate Commerce Commission by Released Rates Order No. 1336 of September 27, 1972, as amended October 26, 1972, subject to complaint or suspension.

NOTE 24.-Where provisions of State Laws vary, the day referred to as Memorial Day being obscure, the date of the day referred to in the different states as "Memorial Day", "Decoration Day" or otherwise and generally observed in lieu thereof, will for the purpose of this item be treated as Memorial Day.

NOTE 26.-(Applies only in connection with the QAP and SLSF) when from or to QAP and SLSF stations, containers must be offered with chassis which will permit loading or unloading of the flat car. Provisions of this note not applicable when QAP or SLSF is an intermediate carrier nor in connection with combination rates from or to connection.

NOTE 28.-Subject to Items 190, 215, 216, 330 and 340 of Western Railroads Rules Tariff 2-E, TCFB ICC 1906.

Other provisions of Western Railroads Rules Tariff 2-E, TCFB ICC 1906, are applicable only to the extent indicated in Note 7 of this item or in Part 1, Item 1072 of this tariff.

NOTE 29.-Will not apply when shipments are loaded in mechanical trailers with nose mounted refrigerated unit.

NOTE 30.-When considering "two successive calendar days", Sundays and Holidays will be excluded (See Note 15).

NOTE 31.-The term "Sufficient shipping instructions"includes name of the consignee, destination ramp or terminal, route and any required Protective Service or dangerous articles information or instructions. Such "Sufficient shipping instructions" shall be furnished in writing or otherwise as agreed to in writing.

NOTE 32.-Shipments handled under this Item by MILW are subject to the provisions of Item 6695 of WTL Freight Tariff 457-I, ICC A-4910 and where substituted service as authorized is performed, rates named herein will apply. (Rules 4(b), 4(i) and 4(k) of Tariff Circular waived; ICC Permission 75654).

NOTE 33.-The following article will be accepted for transportation at the rate subject hereto only when carriers are released by the shipper from all liability in excess of the valuation shown below:

COMMODITY

Government stamped Envelopes, not protected by government locks or seals.

RELEASED VALUATION:

$0.50 per pound.

The article will be accepted for transportation at the rates named in this tariff if shipping order and bill of lading designated the weight thereof and a released valuation not exceeding the value specified for said article. The released

value must be entered on the shipping order and bill of lading in the following form:

"The agreed or declared value of (name the commodity) included in this mixed (carload or trailerload) shipment is hereby specifically stated by the shipper to be not exceeding _____ per _____".

If the shipper fails or declines to execute the above statement, or designates a value for the article exceeding that specified, the article will not be accepted for transportation at the rates subject hereto, and rates published elsewhere in this tariff or in other tariffs lawfully filed with the Interstate Commerce Commission will apply.

The released value shall be deemed to relate to the gross weight of each shipping package separately if shipped in packages or to each pound separately if shipped loose and not to the shipment as a whole. In case of loss or damage to a portion of the shipment, the amount recoverable will be the released value per pound multiplied by the weight of the lost or damaged portion, but not more than the actual loss or damage.

Rates herein based on the released value have been authorized by the Interstate Commerce Commission by Released Rates Order No. 1336 of September 27, 1972, as amended October 26, 1972, subject to complaint or suspension.

NOTE 35.-

(1) Provisions of this item will also apply on tariff having a prior movement by motor common carrier between point of interchange with the railroad on the one hand and locations beyond the railroad terminal area on the other hand.

(2) At rail origin after trailer is interchanged from motor carrier to railroad, the provisions of Paragraphs (A) and (B) below will apply.

(A) TRAILER STORAGE: 24 hours free time Saturday, Sundays and Holidays included, will be allowed the shipper to furnish railroad billing instructions. After expiration of free time storage charges in Item 215 of Western Railroads Rules Tariff 2-E, TCFB ICC 1906 will be assessed against the shipper until time and date billing instructions are received by the railroad. These charges are in addition to charges applicable under Paragraph (B).

(B) TRAILER DETENTION: If billing instructions are not furnished to railroad within 24 hours computed from the first 11:59 PM following interchange of trailer to railroad, detention charges as provided in Item 1072, Part 1 of this tariff under the heading of "Dentention Charges for Trailers", will be assessed against the shipper until time and date billing instructions are received by the railroad. Saturdays, Sundays and Holidays will be excluded in computing free time. These charges are in addition to charges applicable under Paragraph (A).

(3) Trailers interchanged to motor common carriers for movement beyond the billed rail origin will be subject to per diem agreements applicable between the rail carrier and motor common carrier, and railroad tariffs will not apply while trailer is in possession of motor common carrier.

(4) The provisions of this item apply only in connection with motor common carriers with whom the interchanging railroad maintains a written agreement covering interchange of trailers, and then only when consignor or consignee furnishes interchanging railroad with a complete certificate or motor common carrier billing in the following form:

ORIGIN CERTIFICATE

_____ hereby certifies that Trailer _____
(Consignor) (Number)
delivered to your terminal at _____
(Railroad Origin)
by _____ on _____ was loaded at
(Motor Carrier) (Date-Time)
_____ _____ hereby
(Motor Carrier Origin) (Consignor)
accepts responsibility for this trailer as of the time and date trailer was delivered to your terminal.

_____
Signature

Completed certificate or copy of motor carrier billing showing same information must be furnished to interchanging railroad at time loaded trailer is delivered or regular tariff detention provisions will apply from the time trailer was originally delivered to the motor carrier.

NOTE 36.-Rail carriers party to this item will not allow their bond to be used on bonded shipments moving under the rates and other provisions of this item. Rates and other provisions of this item will apply on bonded shipments when moving under a bond other than that of rail carriers party to this item but it will be the full responsibility of the person or company bonding the shipment to assume full responsibility and liability for all additional costs and expense of Custom House clearances at origin and destination, including applicable detention and-or storage charges if any. Rail lines parties to this item will also not advance any charges for Customs House entries and/or clearances.

NOTE 37.-Rates will apply on Clothing, noibn [sic], hanging on hangers or racks, in boxes or other than in boxes. Rates do not include free return of racks or hangers.

NOTE 38.-Shipments handled under this item by OE are subject to the provisions of Item 8270 of WTL Freight Tariff 457-I, ICC A-4910, supplements thereto or successive issues thereof, and where substituted service as authorized is performed, rates named herein will apply.

EXCEPTION 1.-When material, not a part of the pallet, platform or skid, is used to protect top of lading or to secure the load to the pallet, platform or skid, allowance will be made for the weight of the pallet, platform or skid, but not for the weight of such material.

EXCEPTION 2.-The weight of the pallets, platforms or skids, may not exceed 3 per cent of the total weight of the shipment including the weight of the pallets, platforms or skids. Any weight of the pallets, platforms or skids in excess of 3 per cent of the total weight of the shipment will be subject to rate on the freight loaded thereon.

①When in connection with TS applies only via Gateways 63A or 63C, see Item 14005.

③Only to points in Oregon and Washington.

⑤Does not apply in connection with carriers named in ⑥reference mark.

⑥Applies only in connection with the following carriers:

ATSF	RI	MKT	QAP	SSW	TS
BN	CS	MP	RSP	SOO	UP
CEI	DRGW	NWP	SLSF	SP	VE
CNW	FWD	PMT	SDAE	TP	WP
MILW	HI	PSR	SN	TM	

⑧Does not apply in connection with carriers named in ⑨reference mark.

⑨Applies only in connection with the following carriers:

ANR	CS	KCS	QAP	SP	TP
ATSF	DRGW	LA	RI	SN	TS
BN	MILW	MKT	RSP	SSW	UP

CEI	FWD	MP	SLSF	SOO	WP
CNW	ICG	NW	OE	SDAE	TM

EXHIBIT F.

Tariff 1-X
Rules and Other Governing Provisions
Special Rules and Regulations
Limited

ITEM: 1072

SUBJECT Accessorial Charges

APPLICATION:

(Applicable only when specific reference is made to this item)

④PART 1

(1) TRAILERS FURNISHED BY CARRIER

Carriers are not obligated to furnish trailers. However, where trailers as specified in Note 4 of Item 6950 are furnished by the carriers, the following additional charges will be assessed for each trailer furnished and will apply for one-way rail movement, subject also to the detention charges and rules herein provided.

Open Top Vans or ⑥Closed Vans	Mechanical Refrigerator Vans Moving Under Protective Service
(NS)$74.87	③$161.33

(2) CONTAINERS FURNISHED BY CARRIER

Carriers are not obligated to furnish containers. However, where containers (without wheels; See Note 2) as specified in Note 4, Item 6950, are furnished by the rail carriers, the following additional charges will be assessed for one-way rail movement, subject to the detention charges and rules herein provided:

(a) For each set of two containers, each container having maximum length of twenty feet but

not less than 19 feet in length, outside measurement $76.42

(b) For each set of two or more containers (except as provided in paragraph (a)) not exceeding a total combined length of eighty feet, each container not less than 19 feet in length, outside measurement, not moving in protective service $152.84

(c) For each set of two or more containers (except as provided in paragraph (a)) not exceeding a total combined length of eighty feet, each container not less than 19 feet in length, outside measurement, with one or more containers moving in protective service .....③$322.66

(d) For each single container, not exceeding forty feet in length but not less than 19 feet in length, outside measurement, not in combination with other containers, not moving in protective service $76.42

(e) For each single container, not exceeding forty feet in length but not less than 19 feet in length, outside measurement, not in combination with other containers, moving in protective service .....③$161.33

DETENTION CHARGES FOR TRAILERS OR CONTAINERS

In addition to the above charges, trailers or containers furnished by the carrier will be subject to the following:

A. Computing Time

When due to no disability, fault or negligence on the part of the carrier, the loading or unloading of freight is delayed and carrier's trailer or containers is detained beyond the free time described below, the following rules will govern:

(1) (a) Consignors will be allowed 24 hours free time at origin after notification that trailers or containers are available for loading and consignees will be allowed 24 hours free time at destination after notification that trailers or containers are available for unloading. (See Subparagraphs (b), (c) and (d) below for notification procedures and computation of free time).

(b) Except as provided in Subparagraph (c) below, the notification that trailers or containers are available for loading or unloading, as the case may be, will be given by telephone between the hours of 8:00 AM and 5:00 PM, and at additional hours when there is prior mutual agreement in writing between the consignor or consignee, on the one hand, and the carrier, on the other hand, that telephone notification may be given during additional hours. If so requested, confirmation in writing will be made of a telephone notification. When notification is given under the provisions of this Subparagraph (b), free time will be computed from the first 11:59 PM following the telephone notification, excluding Saturdays, Sundays and holidays (See Paragraph (3) below).

(c) In the event that carrier is unable to give notification by telephone that trailers or containers are available for loading or unloading, as the case may be, the notification will be made in writing by the carrier's agent simultaneously mailing two post cards, one addressed to the consignor or consignee, as the case may be, and one addressed back to himself. The postmark date on the post card sent to himself will be used by the carrier's agent to compute free time, with the free time being computed

from 11:59 PM of the postmark date, excluding Saturdays, Sundays and holidays (See Paragraph (3) below).

(d) When a trailer or container is removed from carrier's premises by the consignor or consignee, as the case may be, prior to any notification being given per either Subparagraph (b) or Subparagraph (c) above, such removal will constitute notification and the free time will be computed from the first 11:59 PM following such removal, excluding Saturdays, Sundays and holidays (See Paragraph (3) below).

(2) When detention accrues following termination of free time as determined under Paragraph (1) above, such detention will accrue on each day trailer is detained, including subsequent Saturdays, Sundays and Holidays.

(3) Holidays as referred to above mean only the following:

New Year's Day
Washington's Birthday
Memorial Day (see Note 3)
Independence Day
Labor Day
Thanksgiving Day
Christmas Day

In event any one of the holidays occurs on a Sunday the following Monday will be considered a holiday.

B. Charges and Rules

After expiration of free time as described above, detention charges for each 24 hours or fraction thereof will be assessed as follows, including Saturdays, Sundays and holidays:

(3) TRAILERS

Open Top Vans or Closed Vans	Mechanical Refrigerator Vans With Refrigeration Units Operating During Detention
$13.74	$26.11

(4) CONTAINERS

(a) For each set of two containers, each container having maximum length of twenty feet but not less than nineteen feet $13.74

(b) For each set of two or more containers (except as provided in paragraph (a)) not exceeding a total combined length of eighty feet, each container not less than 19 feet in length, outside measurement, not moving in protective service $27.48

(c) For each set of two or more containers (except as provided in paragraph (a)) not exceeding a total combined length of eighty feet, each container not less than 19 feet in length, outside measurement, with one or more containers moving in protective service $52.21

(d) For each single container, not exceeding forty feet in length but not less than 19 feet in length, outside measurement, not in combination with other containers, not moving in protective service $13.74

(e) For each single container, not exceeding forty feet in length but not less than 19 feet in length, outside measurement, not in combination with other containers moving in protective service $26.11

When consignor or his agent takes the delivery of empty trailer or container at railroad ramp at origin, or consignee or his agent takes delivery of loaded trailer or container at railroad ramp at destination and operates such trailer or

container subject to charges hereinabove provided, the following will apply:

1. Consignee, consignor or his agent agrees that during the period in which trailer or container is in his possession or in the possession of his agent to hold the carrier furnishing the trailer harmless or container(s) from all liability for damages to person or property arising out of the use, operation or maintenance or custody of said trailer or container(s), or arising from any other cause, until said trailer or container(s) has been returned to the carrier.
2. In the event a trailer or container is damaged while in the possession of consignor, consignee or his agent, consignor, consignee or his agent shall by repair, restore it to the condition in which it was received and in event of failure of such party to make such repair, it shall, nevertheless, be responsible for the cost thereof, but in no case for an amount greater than the actual cash value of such trailer or container(s) before damage.
3. Carrier supplying trailer or container shall endeavor, to the best of its ability, to furnish trailer or container in good operating condition. However, carrier makes no warranty or representation, expressed or implied, as to the fitness or condition of the trailer or container furnished and the consignor, consignee or his agent using the trailer or container during the period it is in consignor's, consignee's or his agent's possession does so at his own risk.

PART 2
FLAT CARS FURNISHED BY CARRIER

Carriers are not obligated to furnish flat cars. However, where flat cars are furnished by the carrier an additional charge of $49.53 will be assessed for each flat car furnished and will apply for one-way revenue movement subject also to demurrage charges and demurrage rules provided in Agent J.F. Doyle's Tariff 4-J, ICC H-59.

PART 3

Rail carriers are not obligated to couple chassis or to uncouple chassis that are used to transport containers over the highway. However, when a rail carrier maintains suitable facilities to perform such service and is requested to do so by consignor, consignee or a connecting carrier, the following charges apply and are due from the party requesting the service:

For Each Service of Coupling Two Chassis, Each not Exceeding 20 Feet in Length, Outside Measure, With or Without Containers Loaded Thereon
$14.86
For Each Service of Uncoupling Two Chassis, Each not Exceeding 20 Feet in Length, Outside Measure, With or Without Containers Loaded Thereon
$14.86

NOTE 1.-Where mechanical refrigerator vans with refrigeration units not operating are furnished for shipment to destinations in Arizona, California, Nevada, New Mex-

ico, Oregon, Utah and Washington, charge will be $67.93 for each trailer furnished.

NOTE 2.-Carriers will not furnish bogies or wheels for containers.

NOTE 3.-Where provisions of State Laws vary, the day referred to as Memorial Day being obscure, the date of the day referred to in the different states as "Memorial Day", "Decoration Day" or otherwise, and generally observed in lieu thereof, will for the purpose of this item be treated as Memorial Day.

③Inspection of trailers or containers containing freight requiring protective service will be subject to the provisions and charges published in Rule 815 of Perishable Protective Tariff 18, ICC 37, H.F. Brandl, Agent.

④Subject to Items 200 and 230 of Western Railroads Rules Tariff 2-D, ICC 1855 of Trans-Continental Freight Bureau, Agent.

⑤Subject to Note 1.

(NS) Not subject to Items X-299, X-303 and X-305.

Issued in compliance with order of the Interstate Commerce Commission in Ex Parte 230.

JUN 4 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1621
IN THE

Supreme Court of the United States

October Term, 1980

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Supplement to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

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UNITED STATES OF AMERICA,

Respondent.

Supplement to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

This Supplement to the Petition for Writ of Certiorari is submitted pursuant to Rule 22.6 of this Court to discuss a recent opinion which is relevant to the issues presented in the Petition. The Eighth Circuit Court of Appeals has recently filed its decision in *United States v. United States Steel Corp.*, No. 80-1206, (8th Cir. April 1, 1980) printed in entirety as Exhibit "A" to the Appendix. Such decision is in direct conflict with the Ninth Circuit Court of Appeals decision in the above-referenced case.

Summary.

On March 27, 1981, the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was docketed in this Court as Number 80-1621. Therein, Petitioner presented three questions which raised the subject

matters of (1) primary jurisdiction of the Interstate Commerce Commission to determine issues of tariff interpretation and application, (2) admissibility of evidence of local or trade usage of the tariff and the applicability of the rules of tariff interpretation, and (3) availability of the defense of good faith interpretation of the tariff and admissibility of evidence in support thereof as enunciated in *Lehigh Coal & Nav. Co. v. United States*, 250 U.S. 556 (1919). Each of those issues was addressed in the Memorandum of the United States Court of Appeals for the Ninth Circuit.

On April 1, 1981, the United States Court of Appeals for the Eighth Circuit, before Chief Judge Lay, Circuit Judge Henley, and Senior District Judge Hanson, sitting by designation, filed its opinion in *United States v. United States Steel Corp., supra*. The aforecited case, strikingly similar to the case at bench from the standpoint of issues raised, concerned an appeal by United States Steel Corporation from the granting of a Summary Judgment assessing damages against it in a civil forfeiture proceeding brought by the United States under Section 2 of the Hepburn Act, 49 U.S.C. §41(3).[1, 2]

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[1]The citations to the Interstate Commerce Act in the *United States Steel* opinion, as well as in the opinions in the case at bar, are to the Code prior to recodification.

[2]A portion of the Hepburn Act, ch. 3591, 34 Stat. 584 (1906), amended the Elkins Act, ch. 708, 32 Stat. 847 (1903), by adding the civil forfeiture provisions under which United States Steel was sued. 49 U.S.C. §41(3). But the Hepburn Act also restated the criminal liability section of the Elkins Act under which the case at bar was prosecuted. 49 U.S.C. §41(1). The word "knowing", which Petitioner contends has imposed a scienter requirement, was inserted simultaneously into both subsections 1 and 3 of Section 41, Title 49, by the Hepburn Act. Therefore, the scienter issue presented to the Court of Appeals for the Eighth Circuit in *United States Steel* is virtually identical to those decided in the case at bar by the Court of Appeals for the Ninth Circuit.

ARGUMENT.

In *United States v. United States Steel Corp., supra,* the United States was seeking forfeiture of an amount three times the value of rebates received by United States Steel for shipments of coal from the Eastern United States to its steel mills in Duluth, Minnesota. The applicable tariff allowed rebates if there was a shipment to an "interior destination". The United States contended that intracity movements of coal were not within this tariff provision, and brought an action against United States Steel for rebates it received for such intracity movements. The trial court granted summary judgment for the United States and assessed damages of over $3.5 million, representing treble the amount of allegedly unlawful rebates received by United States Steel. A motion for summary judgment by United States Steel, on the ground that the tariff was unambiguous and covered the rebates involved, was denied.

On appeal to the Court of Appeals for the Eighth Circuit, United States Steel argued that the District Court erred in granting the government's motion for summary judgment on various grounds, including:

(1) the tariff was not ambiguous and required no interpretation;

(2) alternatively, the court erred in its construction and failed to consider evidence bearing on the appropriate construction of the tariff;

(3) if the tariff was ambiguous, then the Interstate Commerce Commission had primary jurisdiction to interpret the tariff;

(4) the court erred in concluding, as a matter of law, that the defendant knowingly violated the tariff and, thus, deprived U.S. Steel of its right to trial by jury. (Slip op. at 5).

1. Primary Jurisdiction.

A direct conflict exists between the Ninth Circuit's decision in the case at bar and the Eighth Circuit's opinion in *United States v. United States Steel Corp., supra,* on the issue of primary jurisdiction of the Interstate Commerce Commission. In the latter opinion, the Eighth Circuit court concluded that the district court erred in failing to refer the issue of tariff construction to the Commission under the doctrine of primary jurisdiction. The conclusion was premised upon this Court's decision in *United States v. Western Pacific Railroad,* 352 U.S. 59, 65 (1956), which was cited for the proposition that: "Where an issue of tariff construction raises questions of transportation policy presenting a need for uniform and expert administration of the regulatory scheme laid down by the Interstate Commerce Act, the Commission has primary jurisdiction." Slip op. at 10-11.

The Eighth Circuit also quoted from *Great N. Ry. v. Merchants Elevator Co.,* 259 U.S. 258 (1922), in which Justice Brandeis stated:

> [W]here the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of *incidents alleged to be attached by usage to the transaction,* the preliminary determination *must* be made by the Commission. (Slip op. at 10, footnote 9) (Emphasis added.)

In the case at bar, although the issue of whether the trip permits were "incidents alleged to be attached by usage to the transaction" was continuously presented to the trial court and to the panel of the Ninth Circuit, the significance of this assertion was apparently missed by both courts. In fact, the court of appeals, citing *Great N. Ry. v. Merchants Elevator Co.,* 259 U.S. at 290 (1922), but misapplying the opinion, held that:

> Defendant contends the permit issue is within the primary jurisdiction of the ICC because of the necessity

> for uniformity in tariff interpretation, and that the Commission should be required by court order to consider the question before a criminal prosecution may commence. The question of a construction of an interstate tariff is one of federal law. Where words are used in their ordinary sense preliminary resort to the ICC is unnecessary. (Citation).

(Petition for Writ of Certiorari, Appendix, Exhibit "A", p. 3)

There can be no other conclusion but that the ramifications involved in the licensing issue raised the necessity for uniformity in tariff interpretation and that the provision of trip permits was an incident attached by usage to the transaction that warranted preliminary resort to the primary jurisdiction of the Interstate Commerce Commission. On the issue of primary jurisdiction the rulings of the courts below are in conflict with the decisions of this Court and with the decision of the Court of Appeals for the Eighth Circuit in *United States v. United States Steel Corp., supra.*

2. Scienter Requirement.

In *United States v. United States Steel Corp., supra,* United States Steel asserted that, by reason of the district court's granting of the motion for summary judgment, it had been denied the defense of good faith tariff interpretation as enunciated in *Lehigh Coal & Nav. Co. v. United States,* 250 U.S. 556 (1919). The Eighth Circuit, while acknowledging that its decision on the issue of primary jurisdiction might make it unnecessary to deal with the question of scienter, proceeded to analyze U.S. Steel's position. It held, as to the opinion in *Lehigh Coal, supra,* that:

> "The clear implication is that a shipper has a defense against a prosecution under the Hepburn Act if it establishes its honest and reasonable belief that it was entitled under the terms of the applicable tariff to any

rebate or offset it may have received." (Slip op. at 20).

Responding to the Government's counter-arguments premised upon *Armour Packing Co. v. United States*, 209 U.S. 56 (1908), and *Union Petroleum Corp. v. United States*, 376 F.2d 569 (10th Cir., 1967), the Eighth Circuit court found said opinions were not to the contrary. It was observed by the court that *Armour Packing* was decided before *Lehigh Coal* and under the version of the Elkins Act in effect before the insertion of the word "knowingly" by the 1906 amendments. (Slip op. at 20). Further, it found that *Armour Packing* was distinguishable on the grounds that it was not a tariff interpretation case but rather a case in which the defendant preferred to believe that its contract rate with the carrier prevailed over the tariff rate when, as a matter of law, tariff rates prevailed over contract rates. Thus, *Armour Packing* was found to have not reached the issues before the court in *Lehigh Coal*.

The Eighth Circuit court also distinguished *Union Petroleum*. It correctly discerned that Union Petroleum's knowledge of the tariffs as well as the *pertinent facts* precluded the shipper's good faith defense *on the merits*. The Court went on to state that to the extent that the *Union Petroleum* case could be interpreted to reject the existence, in principle, of the good faith defense, it was inconsistent with the statute and the *Lehigh Coal* decision and should not be followed.

In the case at bar, the appellate court approved the trial court's preclusion of Santa Fe's defense of good faith tariff interpretation, stating:

> The trial court refused to admit evidence in support of defendant's defense of good faith tariff interpretation. It is clear that the Elkins Act created a *malum prohibitum* rather than *malum in se* offense. Proof of evil intent is not an element of a charge under the Elkins Act. *Armour Packing Co. v. United States*, 209 U.S. 56, 69-72 (1908); *Union Petroleum Corp. v. United*

States, 376 F.2d 569, 573 (10th Cir.) *cert. denied*, 389 U.S. 838 (1967).

(Petition for Writ of Certiorari, Appendix, Exhibit "A", page 3.)

It is true that *Lehigh Coal* and *United States Steel Corp.* involved the prosecution of shippers, but this does not make them inapposite to the present case. The "knowing" requirement in the Elkins Act applies equally to shippers and carriers. The statute reads: "Every person or corporation, *whether carrier or shipper*, who shall, *knowingly*, offer, grant, or give, or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor." 49 U.S.C. §41(1) (emphasis added). Therefore, the *United States Steel Corp.* decision on the issue of scienter is fully applicable to the case at bar.

The Eighth Circuit court pointed out the conflict between the Tenth Circuit and this Court over the issue of scienter. By following the decision of the Tenth Circuit in this case, the Court of Appeals for the Ninth Circuit has shown the necessity for this Court to settle the rule and dispose of this conflict among the appellate courts.

3. Tariff Interpretation.

In its opinion, the Eighth Circuit court concluded that United States Steel's motion for summary judgment was properly denied on the basis that the term "interior destination" was susceptible to differing interpretations and that, as such, the tariff was ambiguous. However, the court also concluded that the district court had ignored applicable tenets of tariff construction in reaching its decision. It was observed by the court that the magistrate did not undertake the investigation to ascertain the intentions of the framers of that tariff and thereby reach a permissible construction of the tariff which conformed to those intentions. In reaching this conclusion, the court observed that: "However, more importantly, we think it fundamental before applying the

limited rule of construction used by a magistrate, a court should first determine a permissible construction which conforms with the intentions of the framers of tariff." (Slip op. at 9).

Counsel for Santa Fe, in the case at bar, made protracted and thorough offers of proof in support of presenting evidence at trial from both expert and employee witnesses as to local or trade usage of the tariff, as well as the intentions of the framer of the tariff. The trial court excluded all evidence which would have permitted it to arrive at a permissible construction of the tariff which conformed with the intentions of the framers of the tariff and comported with the other rules of tariff construction. The Ninth Circuit court affirmed this exclusion of what it termed "expert testimony" by relying on the same case cited by the court in *United States Steel Corp.—Penn Central Co. v. General Mills, Inc.*, 439 F.2d 1338, 1340-41 (8th Cir. 1971). Thus, citing the very same case for authority, the two appellate courts reached opposite conclusions as to the nature and extent of the inquiry required to ascertain the proper effect to be given a tariff.

Conclusion.

The opinion of the Court of Appeals for the Eighth Circuit in *United States Steel Corp.* illustrates the conflict between the decisions of the courts below in the case at bar and the decisions of this Court. Additionally, it creates a conflict between the circuits because the holding in *United States Steel Corp.* is directly in conflict with the holdings below, while the fact situations are essentially similar. For these reasons and the reasons stated in the Petition for Writ of Certiorari, we respectfully submit that this Court should grant certiorari.

Respectfully submitted,

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FREDERICK G. PFROMMER,
Counsel for Petitioner.

EXHIBIT A.

Opinion of the Eighth Circuit Court of Appeals.

United States Court of Appeals, for the Eighth Circuit, Appeal from the United States District Court for the District of Minnesota.

United States of America, Appellee, v. United States Steel Corporation, Appellant, No. 80-1206.

Submitted: November 10, 1980.

Filed: April 1, 1981.

Before LAY, Chief Judge, HENLEY, Circuit Judge, and HANSON,* Senior District Judge.

LAY, Chief Judge.

United States Steel appeals from a grant of summary judgment assessing damages against it in a civil forfeiture proceeding brought by the United States under the Hepburn Act, § 2, 49 U.S.C. § 41(3).[1] The Hepburn Act makes it

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*William C. Hanson, Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

[1]Citations to the Interstate Commerce Act are, for convenience, to the code prior to recodification. The Hepburn Act, ch. 3591, § 2, 34 Stat. 588 (1906), 49 U.S.C. § 41(3) provided in pertinent part:

> Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of sections 41, 42, or 43 of this title, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corportion, or company has knowingly received or accepted from any such common carrier any

(footnote continued on following page)

illegal for a shipper knowingly to obtain the transportation of property at less than the published and filed tariff rates. This action was brought by the United States seeking forfeiture in the sum of three times the value of the rebates received by U.S. Steel between August 1969 and March 1974. Both the Government and U.S. Steel filed motions for summary judgment. On October 6, 1978, the United States Magistrate issued a report and recommended that the Government's motion be granted. By order filed January 14, 1980, the United States District Court for the District of Minnesota denied U.S. Steel's motion for summary judgment and granted the Government's. Judgment was entered in the total amount of $3,557,276.73, representing treble the value of rebates received by U.S. Steel, from which this appeal is taken. We vacate the judgment of the district court and remand for further proceedings in accord with this option.

I. BACKGROUND.

U.S. Steel purchased coal from mines in the eastern United States for the production of steel at its Duluth Works in Duluth, Minnesota. The coal was initially shipped from the mines by the Chesapeake & Ohio Railway to Toledo, Ohio, (first leg of a lake cargo route), then by lake steamer to the port of Duluth (second leg), and finally by rail to

---

sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

This section was originally enacted by Act of June 29, 1906, ch. 3591, § 2, 34 Stat. 588, which amended the Elkins Act, ch. 708, § 1, 32 Stat. 847 (1903), and is now codified at 49 U.S.C. § 11902.

U.S. Steel's Duluth Works (third leg). A separate tariff was filed by the carriers for each leg. The tariffs published by the Chesapeake & Ohio for the first leg of the route included provisions for payment of refunds to qualifying shippers upon certification that the third leg movement was to "an interior destination" as defined in the tariff.[2] Between August 1969 and March 1974 the Chesapeake & Ohio refunded U.S. Steel $1,185,758.91 of the amount initially charged for the shipment of coal to Toledo. These refunds are the subject of this appeal.

The tariff applicable in this case, first published in its present form in February 1953, authorized eastern railways to refund a portion of their transportation charges:

> Upon evidence in form of certificate shown in Item 155 that cargo coal shipped hereunder has been placed in vessels consigned to docks—
>
> 1. In the United States on Lake Superior, including Sault Ste. Marie, MI., and the West Bank of Lake Michigan north of the Illinois-Wisconsin State Line, and *thence transported from such docks* (either as coal or as coal briquettes produced from such coal at the docks) to *interior destinations* in the United States not more than two (2) years after the date coal was loaded into vessels at Lake Erie Ports. (Emphasis Supplied)

The tariff also defined the term "interior destination" with respect to third leg movements by rail or other modes of transportation:

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[2]In 1951 in *James McWilliams Blue Line, Inc. v. United States*, 100 F. Supp. 66 (S.D. N.Y. 1951), *aff'd per curiam*, 342 U.S. 951 (1952), the court held that, in a proportional rate structure similar to lake cargo coal rates, the availability of a rebate on the first leg of the route could not be based solely upon the mode of transportation used in the third leg. After this decision, the eastern railways amended their lake cargo tariffs to allow shippers using modes of transportation other than rail for third leg movements to qualify for rebates on the first leg.

> *For purposes of tariff application, transportation from docks* in the United States on Lake Superior, including Sault Ste. Marie, MI., or on the West Bank of Lake Michigan north of the Illinois-Wisconsin State Line, to *interior destinations* in the United States, or from docks on Lake Superior including Sault Ste. Marie, MI. and Sault Ste. Marie, On. in the United States or Canada to interior destinations in Canada *referred to above means:*
>
> (1) *If transported from said docks by rail, the transportation must be by rail as road-haul freight;*
>
> (2) If transported from said docks by any other means, the transportation must be to interior destinations in the United States or to interior destinations in Canada located outside both the railroad switching limits and the corporate limits of the origin port city. (Emphasis Supplied)

U.S. Steel's Duluth Works is within the corporate limits of the City of Duluth. This fact raises the issue of whether intracity movements of coal from the Duluth docks to Duluth Works was transportation to an "interior destination" within the meaning of the tariff so as to qualify U.S. Steel for rebates under the lake cargo coal tariff.[3] U.S. Steel argued before the magistrate that the tariff defines interior destination alternatively as (1) any destination in or outside Duluth reached by rail as road-haul freight, or (2) any destination outside the railroad switching limits and corporate limits of Duluth if transported from such docks by any means other than road-haul freight. The magistrate rejected this interpretation, and recommended judgment for the Government.

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[3]This intracity movement of coal is performed by the Duluth, Missabe and Iron Range Railway (DM&IR), a wholly owned subsidiary of U.S. Steel.

U.S. Steel alleges the district court erred in granting the Government's motion for summary judgment on various grounds: (1) the tariff is not ambiguous and requires no interpretation; (2) alternatively, the court erred in its construction and failed to consider evidence bearing on the appropriate construction of the tariff; (3) if the tariff is ambiguous, the Interstate Commerce Commission had primary jurisdiction to interpret the tariff; (4) the court erred in concluding, as a matter of law, that the defendant knowingly violated the tariff and, thus, deprived U.S. Steel of its right to trial by jury; and (5) the court erred in refusing to dismiss the complaint because of unreasonable delays in bringing the suit.

II. WHETHER THE TARIFF IS AMBIGUOUS.

U.S. Steel argues that it was entitled to summary judgment because the tariff unambiguously authorizes refunds to a shipper located within the upper lakes port city which has the coal moved from the docks by rail as road-haul freight. U.S. Steel's position is that the term "interior destination" has no geographic prerequisite where the ex-dock transportation is by rail as road-haul freight. The Government contends that the Commission has already defined "interior destination" as a matter of law to include a geographic requirement that the third leg movement be transportation to a location outside the corporate limits of the port city. The Government further urges that a contrary interpretation cannot be given because the tariff would then be discriminatory in violation of section 2 of the Interstate Commerce Act, 49 U.S.C. § 2.

The district court noted the differing interpretations of the term "interior destination" and determined that the tariff was ambiguous. Arguably, the modifier "interior" would ordinarily suggest a destination other than one within the

port city. Alternatively, subparagraph (1) of the defining clause seems to define "interior destination" as a mode of transportation without regard to a geographic destination. The finding of ambiguity seems correct, particularly in light of the existence of issues of fact concerning the drafting of the tariff and disputes over the relevance and meaning of various court and Commission decisions. Thus, the district court correctly denied U.S. Steel's motion for summary judgment.

III. THE CONSTRUCTION OF THE TARIFF.

In recommending judgment in favor of the Government, the magistrate found that U.S. Steel violated the Hepburn Act by receiving rebates not authorized by the tariff because shipments to destinations within the corporate limits of the City of Duluth are not shipments to "interior destinations." The magistrate reasoned that U.S. Steel's interpretation of the tariff was unacceptable, as a matter of law, because that interpretation would cause the eastern railways to discriminate against shippers by allowing rebates for wholly intracity third leg movements by rail but disallowing rebates for wholly intracity third leg movements of coal by truck or other means. The court believed that such intermodal discrimination would violate 49 U.S.C. § 2[4] and, therefore,

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[4]Title 49 U.S.C. § 2 provides in pertinent part:

> If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

See, I.C.C. v. Mechling, 330 U.S. 567 (1947); *Atchison, Topeka & Santa Fe Ry.*, 549 F.2d 1186 (8th Cir.), *cert. denied*, 434 U.S. 874 (1977); *James McWilliams Blue Line, Inc. v. United States*, 100 F. Supp. 66 (S.D. N.Y. 1951), *aff'd per curiam*, 342 U.S. 951 (1952).

was not an interpretation that could be adopted by the court, regardless of the resolution of disputed facts. We have difficulty with this analysis.[5]

In *United States v. Wabash Railroad*, 321 U.S. 403 (1944), the Supreme Court held that the determination of total charges due under a filed tariff for a combination of carrier services was to be accomplished by an investigation of the facts of the carrier's service to the particular shipper to be charged, irrespective of whether charging for a spotting service as part of the total charge would discriminate against the shipper in violation of section 2. *Id.* at 413.[6] The lesson of *Wabash* is that to determine if a person has violated a tariff the primary inquiry is whether the particular carrier's and shipper's situation comes within the terms of the tariff, as defined according to their ordinary and intended meaning, practical application, and commercial context. *Accord Penn*

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[5]It is not clear that the carrier would have violated § 2 if it had allowed U.S. Steel rebates for ex-dock intracity road haul movements but not for ex-dock intracity truck movements because the carrier would not have charged one shipper less than another for substantially the same service. The identification of a single shipper in this case may distinguish it from the § 2 cases relied upon in the district court. *See Blue Line*, 100 F. Supp. 66 (S.D. N.Y. 1951), *aff'd per curiam*, 342 U.S. 951 (1952). Section 2 only prohibits "charging . . . any person . . . greater or less compensation . . . than . . . any other person for . . . a like . . . service . . . under substantially similar circumstances." 49 U.S.C. § 2.

[6]The Wabash Railroad performed a spotting service for the Staley Manufacturing Co. at its plant in Decatur, Illinois. After its investigation, the Commission refused the carrier permission to eliminate charges for the spotting service because performance of the service without charge, or considering the cost of service as included within the tariff rate, would depart from filed tariffs in violation of § 6(7) of the Interstate Commerce Act, 49 U.S.C. § 6(7). The district court subsequently set aside the Commission's order because the carrier's charging for the service would result in discrimination prohibited by §§ 2 and 3(1) of the Act, since similarly situated shippers were not charged for the service. 321 U.S. at 406. The Supreme Court reversed. *Id.* at 413.

Central Co. v. General Mills, Inc., 439 F.2d 1338, 1340-41 (8th Cir. 1971).

The Hepburn Act prohibits only a shipper's departure from the terms of a tariff; that the tariff might be subsequently determined to be unlawful under section 2 in proper proceedings is not controlling for Hepburn Act purposes.[7] The district court apparently overlooked the possibility that the Chesapeake & Ohio may have published a discriminatory tariff, the compliance with which by U.S. Steel would incur it no liability under the Hepburn Act.

The magistrate relied on *Great Northern Railway v. Delmar Co.*, 283 U.S. 686 (1931), for a rule of construction which requires district courts to interpret tariffs so as to

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[7]U.S. Steel's distinction between legally published rates, the departure from which bears certain sanctions, and unlawful or discriminatory tariffs, which invoke different penalties, is well established. *See generally Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 238-40 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). A tariff which is filed, approved and published in accordance with the Interstate Commerce Act has the force and effect of a statute. *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908); *Illinois Cent. G. R.R. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir. 1978). The carrier is bound to collect, and the shipper to pay, the legally established rate. *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 485 (1939); *Texas & Pac. Ry v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907); *Chicago, B. & Q. R.R. v. Ready Mix Concrete Co.*, 487 F.2d 1263, 1267 (8th Cir. 1973). Such legally established tariffs may be unlawful if they violate other sections of the Interstate Commerce Act. *See United States v. Michigan Cement Co.*, 270 U.S. 521, 524 (1926); *James McWilliams Blue Line, Inc. v. United States*, 100 F. Supp. 66 (S.D. N.Y. 1951), *aff'd per curiam*, 342 U.S. 951 (1952) (tariffs which provided rebates for ex-dock rail shipment but not for ex-dock barge shipments violated § 2); *Atchison, T. & S. F. Ry. v. United States*, 549 F.2d 1186 (8th Cir.), *cert. denied*, 434 U.S. 874 (1977). Nevertheless, carriers must collect their published rates, even though they are violative of other sections of the Interstate Commerce Act. *Davis v. Portland Seed Co.*, 264 U.S. 403, 425 (1924) ("The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified.") *See also Oregon Short Line R.R. v. American Smelting & Refining Co.*, 269 F. 898 (8th Cir. 1920).

avoid possible violations of law. *See also Penn Central Co. v. General Mills, Inc.*, 439 F.2d 1338, 1341 (8th Cir. 1971); *National Van Lines, Inc. v. United States*, 355 F.2d 326, 332-33 (7th Cir. 1966). Although we acknowledge the desirability of interpreting tariffs so as to obviate illegal results, we do not believe *Delmar* established an inviolable rule. We cannot accept such a myopic approach to tariff interpretation where it will result in substantial liability for a shipper without affording it a chance to prove it complied with the original and intended interpretation of the tariff.[8] We conclude the district court erred in construing the tariff solely upon the rule of construction which would attempt to avoid a violation of section 2. This rule as set out in *Penn Central* may be used to obviate a strict construction against a carrier. A corresponding rule of construction is that ambiguity or doubt should always be decided in favor of the shipper. However, more importantly, we think it fundamental before applying the limited rule of construction used by the magistrate, a court should first determine a permissible construction which conforms with the intentions of the framers of tariff. *See Penn Central*, 439 F.2d 1340-41. Here the magistrate did not undertake this investigation.

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[8]The application of the principle of tariff construction in *Delmar* produced a quite different result from the one obtained in this case. In *Delmar*, the result was the denial of reparations to a shipper upon finding that the customary charges were not in excess of those prescribed by the tariff which was interpreted so as to avoid problems under the long and short haul clause, 49 U.S.C. § 4. In this case, the result was treble liability for the refunded portion of customary charges upon a ruling that the shipper paid less than prescribed by the tariff which was interpreted to avoid possible § 2 problems. The necessary corollary of ruling that U.S. Steel paid less than the tariff prescribed is that the Chesapeake & Ohio Ry. collected less than the tariff prescribed in violation of § 6(7). Thus, the district court's interpretation, designed to avoid hypothetical § 2 problems, means that, for 20 years, U.S. Steel and its carrier violated the prohibitions against departing from the terms of the tariff. The district court finds two actual violations of law in order to avoid one hypothetical violation.

IV. PRIMARY JURISDICTION.

Where an issue of tariff construction raises questions of transportation policy presenting a need for uniform and expert administration of the regulatory scheme laid down by the Interstate Commerce Act, the Commission has primary jurisdiction.[9] *United States v. Western Pacific Railroad*, 352 U.S. 59, 65 (1956). Justice White summarized:

> No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reason for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression

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[9]In suits between a shipper and carrier where construction of a tariff requires evidence of the peculiar meaning of certain words attached by usage to the tariff, the preliminary interpretation should be made by the Commission. In *Great N. Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922), Justice Brandeis stated:

> [W]here the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language—a question of law—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them or that a particular usage existed.

Id. at 292.

Illustrative of cases which have required a factual determination by the Commission to precede the court's interpretation are: *Texas & Pac. Ry. v. American & Timber Co.*, 234 U.S. 138 (1914) (the question of whether the word "lumber" as used in a carrier's tariff included oak railroad crossties required preliminary referral to the Commission); *McLean Trucking Co. v. United States*, 387 F.2d 657 660-61 (Ct.Cl. 1967) (the question whether the word "destination" was used in its ordinary sense in the pertinent tariff was to be determined preliminarily by the Commission); *Louisville & N. R.R. v. Knox Homes Corp.*, 343 F.2d 887 (5th Cir. 1965) (transit privileges); *United States v. Great v. N. Ry.*, 337 F.2d 243, 246-47 (8th Cir. 1964) (transit privileges).

> by this Court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. *See Far East Conference v. United States*, 342 U.S. 570.

Id. at 64.

In the present case, we have concluded that preliminary interpretation by the Commission is necessary because there is a dispute as to whether the words "interior destination" are used in an ordinary or special sense. *Texas & Pacific Railway v. American Tie & Timber Co.*, 234 U.S. 138, 146, (1914). Since such a dispute could only be resolved within the court system by fact finders which might reach different results in similar cases, the interest of uniform regulatory policy favors an initial determination by the Commission. See *Thompson v. Texas Mexican Railway*, 328 U.S. 134, 147-48 (1946); *see also* Jaffe, Primary Jurisdiction, 77 Harv. L. Rev. 1037, 1043 (1964). Resort to the Commission in this case would also promote uniform transportation policies because the Commission could consider the tariff in light of transportation policies under the Interstate Commerce Act, including section 2.

Since the Commission has had similar lake cargo tariffs before it on several previous occasions, its expertise and familiarity with these tariffs could prove valuable for resolving this dispute. An investigation of the facts surrounding the issuance of the tariff and the history, practical application, and commercial context of the terms "interior destination" and "road-haul freight" would be relevant. Additionally, the question whether U.S. Steel's road-haul movement qualifies it for rebates may depend on an analysis

of the cost considerations that underlie the rebate policies governing other Great Lakes shippers who are similarly situated to U.S. Steel. The Commission has primary jurisdiction over considerations of cost factors, *United States v. Western Pacific Railroad*, 352 U.S. 59, 69 (1956), and treatment of similarly situated shippers, *United States v. Wabash Railroad*, 321 U.S. 403, 411 (1944).

That the Hepburn Act directs the Attorney General to proceed in federal court should not obviate the primary jurisdiction of the Commission over disputed issues of a technical nature.[10] The doctrine of primary jurisdiction applies even when the courts have exclusive jurisdiction over the initiation of the action.[11]

The Government further contends that sending the issue of tariff interpretation to the Commission is not warranted because the Commission has already made its position clear by referral of this case to the Attorney General for prosecution. We cannot assume that referral to the Attorney General constitutes a clear interpretation by the Commission. We are cited no formal Commission interpretation, and the Government does not demonstrate that the Commission ana-

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[10]The mere fact that the United States is a party does not obviate the primary jurisdiction of the Commission, as evidenced by cases involving the United States as a shipper where the Commission has primary jurisdiction over issues of fact. *See, e.g., McLean Trucking Co. v. United States*, 387 F.2d 657, 661 (Ct.Cl. 1967); *United States v. Great N. Ry.*, 337 F.2d 243, 246-47 (8th Cir. 1964).

[11]*See Hewitt-Robins, Inc. v. Eastern Freight Ways, Inc.*, 371 U.S. 84, 89 (1962) (it is not a premise of the doctrine of primary jurisdiction that the agency have the power to give the relief sought in the judicial action). In § 9 proceedings which may be initiated in the courts or Commission, when issues within the primary jurisdiction of the Commission arise, the court will refer such issues to the Commission and retain exclusive jurisdiction of any civil action to enforce, enjoin, set aside, or annul a Commission order arising out of the referral. 28 U.S.C. § 1336(b); *I.C.C. v. Atlantic Coast Line R.R.*, 383 U.S. 576, 580 (1966).

lyzed the historical or commercial evidence on this technical question of tariff construction. Furthermore, referral for prosecution by an employee of the Commission cannot bind the Commission, *Thompson v. Texas Mexican Railway*, 328 U.S. 134, 146 (1946).[12]

The Government argues that it is not necessary to refer the matter to the Commission since the Commission has already made clear its interpretation of this tariff in *Refund on Lake Cargo Coal*, 278 I.C.C. 117 (1950); *Refunds on Lake Cargo Coal to Canadian Ports*, 293 I.C.C. 27 (1954); and *Refund Provisions, Lake Cargo Coal*, 299 I.C.C. 659 (1957).[13] None of the cases holds that the tariff disallows rebates when coal is moved within the upper lake port as road-haul freight. In direct contradiction to the Government's interpretation of the lake cargo tariff is the Commission decision in *Chicago & North Western Railway v. Louisville & Nashville Railroad* (*Sheboygan*), 318 I.C.C. 286 (1962). The Commission decision recognized that a shipper received rebates for third leg intracity road-haul movements of coal under the lake cargo tariff. That such a practice occurred at Sheboygan under a tariff similar to the one covering shipments to Duluth during some of the

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[12]The Government also suggests that the reasons for not referring an issue to the Commission when the Commission brings the action apply with equal force when the Justice Department does so. When the Commission is a party the principal function of the doctrine of primary jurisdiction, i.e., to learn the agency's position, has already been fulfilled. K. Davis, 3 Administrative Law Treatise § 19.02, at 14 & n.41 (1958). In this case, however, the Commission's position has not been clearly defined.

[13]Although the magistrate concluded that these opinions would not be sufficient to resolve the factual issue concerning the meaning of "interior destination" the magistrate notes that the Commission's decisions relied upon by the government supports the Government's interpretation.

same years raises a genuine issue of fact regarding the tariff's interpretation.[14]

The Government urges that the district court construction of the tariff was made necessary in order to obviate the question of unlawful discrimination under section 2; it urges that the discrimination which would result from U.S. Steel's interpretation is so obvious that no special Commission expertise is needed. We disagree on both grounds.

As we have earlier discussed, we do not find U.S. Steel's construction of the tariff necessarily results in discrimination.[15] Further, in *Indiana Harbor Belt Railroad v. United States, 510 F.2d 644 (7th Cir.), cert. denied,* 422 U.S. 1042 (1975), the Seventh Circuit held that a district court, in reviewing the determination of the Commission about the application of a tariff, should not consider ab initio the question whether the Commission's interpretation of the tariff would result in discrimination unlawful under section 2. In *Harbor Belt,* the Seventh Circuit stated:

> We think, however, that the district court in reaching its decision took into consideration matters not properly before it and that on the issue which was properly

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[14]The *Sheboygan* decision involved transportation of coal to a utility company which had a plant within the corporate and switching limits of Sheboygan, Wisconsin. From March 1953 to October 31, 1960, the utility received rebates under the lake cargo coal tariff for third leg intracity road-haul movements. *See* 318 I.C.C. at 287-88 nn.3 & 5 and accompanying text. As the magistrate noted, after October 31, 1960, the tariff was amended and other modes of third leg transportation qualified for rebates. Nevertheless, the magistrate overlooked the fact that for eight years before 1960 an intracity shipper, like U.S. Steel in Duluth, received rebates under a lake cargo coal tariff for third leg road haul movements.

[15]*See* note 5 supra. Moreover, § 2 prohibits only that discrimination which is unjust. *Nashville, C. & St. L. Ry. v. Tennessee,* 262 U.S. 318, 322 (1923). Whether some historical, commercial or economic circumstances might justify the discrimination perceived by the magistrate is an issue delegated initially to the Commission by the statute and interpretations under it.

before it, the validity of the interpretation by the Commission of the tariffs involved, the court erred. We are satisfied, in particular, that it was not within the province of the district court, in reviewing the determination of the Commission on this issue, to consider *ab inito* the question whether the application of the tariffs as interpreted by the Commission, would result in unlawful discrimination in violation of section 2 of the Interstate Commerce Act. 49 U.S.C.A. § 2. For it is settled that primary jurisdiction for determining whether rate charges are discriminatory lies with the Interstate Commerce Commission and not with the courts. United States v. Wabash R.R., 1944, 321 U.S. 403, 410-411, 64 S.Ct. 752, 88 L.Ed. 827. The inquiry involves the exercise of discretion in a technical field requiring the expertise of the Commission, whether it is conducted to determine if a party in the past has been wronged, a judicial function, or to determine what rate or practice shall be deemed reasonable in the future, a legislative function. Great Northern Ry. v. Merchants Elevator Co., 1922, 259 U.S. 285, 291, 42 S.Ct. 477, 66 L.Ed. 943. That a body should exist fitted to make a primary determination from the facts as to whether a preference or discrimination obtains was one of the reasons for the creation of the Commission. United States v. Chicago Heights Trucking Co., 1940, 310 U.S. 344, 352, 60 S.Ct. 931, 84 L.Ed. 1243. Thus the courts must enforce a rate, even though alleged to be discriminatory, until the matter of discrimination has first been decided by the Commission. Texas & Pacific Ry. v. Abilene Cotton Oil Co., 1907, 204 U.S. 426, 439, 27 S.Ct. 350, 51 L.Ed. 553. Indeed one of the purposes of the Interstate Commerce Act is to provide an effective means to redress unjust discrimination through the publication of rates and their undeviating application subject to review and approval by the Commission.

Id. at 649 (footnote omitted).

Courts have long recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden discrimination. *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344, 352-53 (1940); *United States v. Louisville & Nashville Railroad*, 235 U.S. 314, 320 (1914). A judgment that tariff rates "are unreasonably high or discriminatory . . . lies solely within the province of the Interstate Commerce Commission." *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 222 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). *See also Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951); *Thompson v. Texas Mexican Railway*, 328 U.S. 135, 137 (1946); *Robinson v. Baltimore & Ohio Railroad*, 222 U.S. 506, 511 (1912); *Coca-Cola Co. v. Atchison, Topeka & Santa Fe Railway*, 608 F.2d 213, 220 (5th Cir. 1979); *Union Pacific Railroad v. Bay Area Shippers Consolidating Association*, 594 F.2d 1291 (9th Cir. 1979); *Danna v. Air France*, 463 F.2d 407, 410, (2d Cir. 1972); *Taylor County Sand Co. v. Seaboard Coast Line Railroad*, 446 F.2d 853, 854-55 (5th Cir. 1971); *Chicago, Rock Island & Pacific Railroad v. Furniture Forwarders of St. Louis, Inc.*, 420 F.2d 385, 388-89 (8th Cir. 1970).[16]

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[16]The Government argues that the Commission's primary jurisdiction over § 2 issues does not prohibit the district court from rejecting, as a matter of law, an interpretation of the tariff which would violate § 2. The Government's distinction between setting aside a tariff under § 2 and construing one in light of § 2 is not an inherently obvious distinction. The district court's ruling means that U.S. Steel could prove no set of facts which would allow its liability under the Hepburn Act to be determined under an interpretation which authorized rebates for third leg intra-city road-haul movements. This is very much akin to setting aside a tariff as discriminatory.

We conclude that the district court erred in failing to refer to issue of tariff construction to the Commission under the doctrine of primary jurisdiction.

V. SCIENTER UNDER THE HEPBURN ACT.

Since the referral to the Commission necessitates a remand to the district court we find it unnecessary to deal with most of the remaining issues, which may be mooted and will certainly be illuminated by the construction imposed on the tariff by the Commission. We think it well, however, to address here an issue of law decided by the district court, relating to U.S. Steel's defense of lack of scienter against liability under the Hepburn Act in the circumstances of this case.

The Hepburn Act makes it an offense for a shipper to "knowingly . . . receive or accept . . . rebate or offset against the regular charges . . . as fixed by the [tariffs]." *See* n.1, *supra*. The district court, relying on *Armour Packing Co. v. United States*, 209 U.S. 56 (1908) and *Union Petroleum Corp. v. United States*, 376 F.2d 569 (10th Cir. 1967), held that it is no defense even if the shipper establishes that it received the rebate in the good faith and reasonable belief that it was authorized to do so under the applicable tariff—in the belief, in effect, that it was paying no more and no less to the carrier than the regular charge fixed by the tariff, and did not believe, much less know, that it was receiving a rebate or offset against the subsequently determined "regular charge." According to the district court, "[i]t is simply not a defense to [a Hepburn Act] forfeiture suit that the defendant gave a mistaken legal interpretation to the tariff. . . . [T]he requirement that the shipper must 'knowingly' receive a concession . . . requires only that the shipper must have intentionally done something the effect of which was to violate the statutory prohibi-

tions." The district court would thus in effect read the scienter requirement out of the Hepburn Act, and impose strict liability on shippers who receive rebates or offsets against the "regular charges" fixed by tariff, even where the shipper may honestly and reasonably believe that it is receiving no unauthorized rebate or offset.

We do not think that Congress intended to go so far. As its legislative history reveals, the Hepburn Bill[17] was sent from the House of Representatives to the Senate in early 1906.[18] When Senator McCumber originally introduced the treble forfeiture amendment, it contained no scienter requirement.[19] The Senate adopted the treble forfeiture provision but proscribed only "knowingly and willfully" receiving rebates or offsets against normal charges.[20] The Conference Committee struck "knowingly and willfully" from the amendment, making the provision one essentially of strict liability, like Senator McCumber's original proposal.[21] This deletion sparked considerable debate in the Senate, and these debates indicate that the Senate was unwilling to punish with criminal or treble forfeiture sanctions honestly mistaken departures from published rates or honest mistakes as to the appropriate rate.[22] The Conference Committee reinstated the requirement that departures from pub-

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[17]H.R. 12987, 59th Cong., 1st Sess. (1906).

[18]H.R. Rep. No. 591, 59th Cong. 1st Sess. 1 (January 27, 1906).

[19]Senator McCumber's original proposal provided:

> That if it be established that any railroad company has granted or paid, directly or indirectly, by or through any means or device whatever, any rebate or preference to any shipper, that both such railroad and said shipper shall be adjudged to pay a fine of three times the amount of such rebate. . . .

40 Cong. Rec. 2973 (1906).

[20]40 Cong. Rec. 6628 (1906).

[21]Conf. R., Railway Rate Bill, S. Doc. No. 476, 59th Cong., 1st Sess. 3 (1906) (amendment number 29 . . . strike out "knowingly and willfully". . . .); 40 Cong. Rec. 7932 (1906).

[22]40 Cong. Rec. 7932-36, 7985, 7987, 7990-92, 7995 (1906).

lished rates be "knowing" to warrant the Hepburn Bill sanctions.[23] The bill passed both houses with this language. There is little doubt that the Hepburn Act was not intended to impose sanctions on shippers who receive rebates or offsets in the honest and reasonable belief that they are entitled to them under the terms of the applicable tariffs.

This conclusion is confirmed by *Lehigh Coal & Navigation Co. v. United States*, 250 U.S. 556 (1919), a case similar to this one in many repsects. In *Lehigh Coal* the shipper had for some years prior to the enactment of the Hepburn Act been receiving a rebate of 14% of the applicable tariff rate from the carrier under the terms of the contract between them. After the Hepburn Act went into effect, a footnote was added to the tariff which apparently provided for the rebate in the tariff itself. All of the tariffs filed by the carrier after 1906 contained the footnote, and the shipper continued to receive the rebate, apparently with the knowledge of the I.C.C. itself. In the subsequent criminal prosecution under the Elkins Act as amended by the Hepburn Act, one of the shipper's defenses was

> [T]hat it had not "knowingly" accepted a rebate within the meaning of the Act—its contention being, that the allowance had been accepted in good faith, in the honest belief that . . . the allowance was properly and legally noted and provided for in the filed and published tariffs.

250 U.S. at 561.

At the close of the trial the district court struck from the record all of the evidence on the subject of the shipper's good faith.

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[23]Conf. R., Rate Bill, H.R. Doc. No. 5003, 59th Cong., 1st Sess. 3 (June 23, 1906); Conf. R., Rate Bill, H.R. Doc. No. 5076, 59th Cong., 1st Sess. 3 (June 28, 1906).

> [A]nd refused to submit the question of good faith to the jury, holding that the [shipper's] honest belief that the allowance was permitted by the tariffs and the footnote thereto could not affect the issue, for the reason that the [shipper] knew the contents of the tariffs, and knew also that the allowance was actually made and received.

Id. at 562.

The Supreme Court held that this was error. Noting that the shipper's misunderstanding of the tariff (if any) "was induced by practice and the opinion of those in authority that the act was complied with," the Court found that "the word 'knowingly' . . . must be considered and given exculpating effect if error there was," *id.* at 566, specifically holding that the shipper had

> [A] right to offer evidence that the allowance was received under the honest belief that it was lawfully established by the tariff, and under the honest belief that in receiving it he was not disregarding what he believed to be the provisions of the tariff but was complying therewith[.]

Id. at 562, 566.

The clear implication is that a shipper has a defense against a prosecution under the Hepburn Act if it establishes its honest and reasonable belief that it was entitled under the terms of the applicable tariff to any rebate or offset it may have received.

Armour Packing Co. v. United States, 209 U.S. 56 (1908), and *Union Petroleum Corp. v. United States*, 376 F.2d 569 (10th Cir. 1967), are not to the contrary. *Armour Packing* was decided before *Lehigh Coal* and under the version of the Elkins Act in effect before the insertion of the word "knowingly" by the 1906 amendments. In any case, in *Armour Packing* the shipper clearly knew what

tariff applied and what rates that tariff fixed; its defense to the Elkins Act prosecution was that it believed in good faith that its contract with the carrier, rather than the published tariff, controlled the rates it must pay. The Supreme Court simply held that the shipper would be held to know that as a matter of law the tariff rates prevailed over the contract rates; the Court specifically reserved the question later addressed in *Lehigh Coal* and raised here, "Whether shippers who pay a rate under the honest belief that it is the lawfully established rate, when in fact it is not, are liable under the statute. . . ." 209 U.S. at 85-86. *Union Petroleum* too is distinguishable from this case. There the shipper paid the carrier a transit or through rate lower than the local rates even though it was substituting one product for another at an intermediate point of the journey. Its defense to the Elkins Act prosecution was that it "acted in the honest and reasonable belief that it was entitled to avail itself of the transit tariff privilege." 376 F.2d at 573. The Tenth Circuit rejected this defense, finding that the shipper "had full knowledge of the tariffs as well as all facts which would render the transit privilege inapplicable and discriminatory herein . . . ." *Id.* We think that this finding was probably sufficient to negate the shipper's good faith defense *on the merits*, on the ground that the shipper could not have believed "honestly and reasonably" that it was entitled to the transit rate in view of its full knowledge of the relevant tariffs and the facts rendering the transit rate inapplicable. We recognize that there is language in *Union Petroleum* that suggests that the court rejected the shipper's good faith defense *in principle*. To the extent that that language is inconsistent with the legislative history of the Hepburn Act and the holding of the Supreme Court in *Lehigh Coal*, we simply disagree with it.

We conclude that a shipper has a defense to a treble forfeiture proceeding under the Hepburn Act if it can establish that any rebates or offsets it may have received (even though these are later determined to be unauthorized by the applicable tariff) were received in the honest and reasonable belief that they were in fact authorized by the tariff, and that in receiving them the shipper was not disregarding what it believed to be the provisions of the tariff but was complying therewith. *Lehigh Coal & Navigation Co.*, 250 U.S. at 562, 566. No other question concerning the scope of the scienter requirement of the Hepburn Act is raised by the record in this case, and we neither express nor imply any further opinion on that matter. As to the defense here recognized, we believe that where a shipper can establish its honest and reasonable (though mistaken) belief by reference to ambiguities in the tariff itself, the history of its adoption and of practice under it or the opinions of those in authority about the rates fixed thereby, the shipper has a good defense. We leave the application of these principles to the facts of this case to the district court on remand.

In conclusion, we vacate the judgment of the district court adopting the magistrate's finding and remand for further proceedings in accord with this opinion. The Government, if it wishes to proceed with this action, shall file a petition for a declaratory order with the Commission for a determination of whether U.S. Steel's receipt of rebates was against regular charges established by the tariff. *Southern Pacific Transportation Co. v. United States*, 505 F.2d 1252, 1254 (Ct.Cl. 1974). Upon referral to the Commission, the Commission should allow both parties to present evidence on the proper construction of the tariff. Once the Commission has interpreted the tariff, both U.S. Steel and the Government shall have the opportunity to challenge the Com-

mission's interpretation in the district court, 28 U.S.C. § 1336(b).

The constitutional issues concerning vagueness and the denial of due process need not be passed upon until a more authoritative interpretation of the tariff is made. A different interpretation of the tariff may obviate these issues. The district court's judgment on these issues is vacated and these issues should be reviewed, if necessary, by the court following referral to the Commission in light of the evidence produced before the Commission and the court.

The judgment of the district court is ordered vacated and the cause is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 80-1621

MAY 27 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the doctrine of primary jurisdiction does not require the Interstate Commerce Commission to interpret an unambiguous tariff.

2. Whether, in the circumstances of this case, petitioner was entitled to present evidence showing that it believed that the tariff permitted it to make concessions alleged by the indictment to be unlawful.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1-3) and the district court (Pet. App. 5-21) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1980. A petition for rehearing was denied on January 26, 1981 (Pet. App. 4). The petition for a writ of certiorari was filed on March 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is a prosecution under the Elkins Act, former 49 U.S.C. 41(1),[1] against a railroad for making concessions to its shipper customers that were not permitted by the railroad's tariff on file with the Interstate Commerce Commission. Following a trial by jury in the United States District Court for the Central District of California, petitioner was convicted on 48 counts of offering and granting illegal concessions. The district court imposed fines totaling $25,000 on five counts of the indictment. It also imposed fines totaling $860,000 on the remaining 43 counts, and imposed a three-year term of probation. The fines totaling $860,000 were suspended during probation. The court of appeals affirmed (Pet. App. 1-3).

1. The government's evidence at trial showed that in 1975 petitioner offered trailer-on-flat-car service through published tariffs. Under this kind of service, the shipper delivers its trailers by motor vehicle to the railroad's ramp at the point of origin, and the shipper's consignee picks them up and drives them

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[1] Section 41(1) was originally enacted in 1903 as part of the Elkins Act and is today codified (with certain nonsubstantive changes) at 49 U.S.C. (Supp. III) 11903-11904. Section 41(1) provides in pertinent part:

> [I]t shall be unlawful for any person * * * to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property * * * whereby any such property shall * * * be transported at a less rate than that named in the tariffs published and filed by such carrier * * *. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, * * * shall be deemed guilty of a misdemeanor * * *.

away by motor vehicle from the railroad's ramp at the point of destination. The tariff prescribed a line-haul transportation charge applying to transportation from ramp to ramp (see Pet. 4-5). The tariff specified that when a trailer is furnished by the railroad, the shipper must pay an additional "accessorial" or rental charge (*id.* at 6).

The evidence also showed that California law requires that trailers, originated and licensed in other states but shipped to California and driven from the railroad's ramp over California highways, must be registered and licensed in California. In 1975, petitioner obtained and paid for numerous 5-day permits that permitted its customers to drive the railroad's trailers on California highways after pickup. Nothing in the tariff filed by petitioner with the Interstate Commerce Commission permitted it to make those payments or concessions for its customers, or even referred to state permit requirements and expenditures (Pet. App. 5-7).

Effective July 6, 1976, petitioner amended its tariff by adding a provision expressly permitting it to provide, with respect to railroad furnished trailers, "proper licensing of such trailer or trailers for highway transportation to and/or from [petitioner's] ramp location in Arizona or California or New Mexico" (Pet. App. 7).

2. During the course of the trial, the district court allowed the pertinent tariff provisions to be presented to the jury but denied petitioner's request to introduce evidence that purportedly showed that it had a good faith belief that the tariffs permitted the payments in question (Pet. App. 10).[2] Following the

[2] This included evidence that purported to show the usage and understanding of the industry regarding such payments. *Ibid.*

jury's verdict, petitioner moved for an acquittal or new trial on the grounds, *inter alia*, that extrinsic evidence concerning the meaning of the tariff should have been admitted; that the tariff should have been referred to the Interstate Commerce Commission pursuant to the doctrine of primary jurisdiction for administrative interpretation; and that the district court improperly excluded evidence showing petitioner's good faith misunderstanding of the tariff. The district court denied the motions on the ground that the tariff is unambiguous and that a carrier's purported mistake as to the meaning of its own tariff is not a defense under the Elkins Act provisions applicable to carriers (Pet. App. 5-22). In so ruling, the court noted that, on several occasions before petitioner amended its tariff, a Commission employee had warned petitioner that its actions were in likely violation of the Elkins Act (*id.* at 14-15). The court also noted that, during the relevant period, petitioner's own trailer receipt contracts provided that the receiver of the trailers, and not petitioner, was required to pay all state license expenses (*id.* at 17). In affirming the convictions, the court of appeals agreed with the district court that the tariffs were unambiguous, that reference to the Commission therefore was not required under the doctrine of primary jurisdiction, and that a carrier's misconstruction of its own tariff is not a defense in an Elkins Act prosecution (Pet. App. 1-3).

ARGUMENT

1. Petitioner argues (Pet. 12-15) that the district court and the court of appeals erred in declining to refer the tariff to the Commission for interpretation under the doctrine of primary jurisdiction. That claim is without merit.

As petitioner acknowledges (Pet. 12), this Court ruled in *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 64 (1956), that

> [n]o fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

The primary jurisdiction analysis thus turns on the particular facts of each case and "depends on whether the [case] raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the Act." *Id.* at 65. See also *United States* v. *United States Steel Corp.*, No. 80-1206 (8th Cir. Apr. 1, 1981), slip op. 11-17.[3]

Under these principles, the courts below correctly concluded that reference of the tariff was not required. Both courts concluded that the tariff was unambiguous and required no administrative expertise to resolve uncertainties, construe terms of art, or reconcile prior agency interpretations. Petitioner

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[3] *United States Steel Corporation* involved an Elkins Act prosecution against a shipper. The Eighth Circuit concluded that the tariff at issue should have been referred to the Commission for initial interpretation under the doctrine of primary jurisdiction. The court's conclusion was based on its determination that the tariff was ambiguous, that prior Commission decisions had not resolved its meaning, and that complex issues of discrimination required the Commission's expert judgment. Slip op. 11-17. Those circumstances are fundamentally different from the circumstances in the present case, and in view of the Eighth Circuit's recognition that the application of the primary jurisdiction doctrine turns on the facts of each case (*id.* at 11-12), there is no conflict with respect to the governing legal principles.

offers no convincing reason for invoking the primary jurisdiction doctrine in such circumstances. Petitioner's argument, in essence, is that its tariff was ambiguous and required agency interpretation because the tariff did not *prohibit* petitioner from paying for the highway permits (see Pet. 9). But the fact that a tariff does not prohibit a carrier from making payments on behalf of a shipper provides no support for the claim that it permits such payments. The statute forbids all rebates and concessions that depart from the rates expressly set forth in the tariff. Petitioner cites no language in the tariff that suggests that the payments were permissible, nor any prior Commission decision supporting its contention. Indeed, as the district court noted (Pet. App. 17), the evidence at trial showed that petitioner's own trailer receipt contracts provided that the recipient of the trailers, and not petitioner, must pay for all state licenses.

Contrary to petitioner's claim (Pet. 13-14), this case raises no broad question of national transportation policy requiring an agency interpretation. This prosecution involves no question of reasonableness, discrimination, or a carrier's right to authorize license payments in its tariff. Indeed, in 1976 petitioner amended its tariff to permit it to make the very payments it is charged with impermissibly making in 1975 (Pet. 7-8). Accordingly, the narrow factual question in this case is whether petitioner's tariff, in effect before 1976, permitted it to make the challenged payments. That factual question does not warrant this Court's review.[4]

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[4] Because there was no ambiguity in petitioner's tariff that would require reference to the Commission, there is no merit to petitioner's related contention (Pet. 15-17) that the district court should have permitted it to introduce evidence of

2. Petitioner also argues (Pet. 18-20) that it should have been allowed to present evidence showing that it believed that its tariff permitted the challenged payments on behalf of its shippers even if that belief was erroneous as a matter of law. In the circumstances of this case, however, the courts below correctly concluded that no such defense was available to petitioner.

What a tariff means is a question of law, and a purported mistake of law is ordinarily not a defense in either civil or criminal proceedings. See *United States* v. *International Minerals Corp.*, 402 U.S. 558, 562-564 (1971). Decisions of this Court and the courts of appeals have held that the Elkins Act only requires proof that the defendant knew what the tariff said and what payments it made or received. The Act does not permit a defense based on subjective belief that the tariff means other than what it says. See *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908); *Union Petroleum Corp.* v. *United States*, 376 F.2d 569, 573 (10th Cir. 1967). As this Court stated in *Union Pacific R.R.* v. *United States*, 313 U.S. 450, 462 (1941): "Violation of the commerce acts through receipt of advantages is to be tested by actual results, not by intention" (footnote omitted). See also *United States* v. *General Motors Corp.*, 226 F.2d 745, 748 (3d Cir. 1955).

Petitioner's reliance on *Lehigh Coal and Navigation Co.* v. *United States*, 250 U.S. 556 (1919), is wholly misplaced in the present context. In that case, the allowance received by the defendant shipper was specifically authorized by a footnote in the tariff.

"usage of trade" that purportedly would show that other railroads also paid for temporary permits on behalf of their customers.

The government's only objection was that the footnote did not directly specify the amount of the allowance, but referred to another contract for such information. Moreover, the evidence showed that Commission officials had been aware of the payments and had not objected to them, and that at least one Commission official specifically approved the form of the tariff. See *id.* at 560-566. In those circumstances, this Court held that Congress did not intend to impose liability. In the present case, in contrast, there was nothing in the tariff that authorized the challenged payments. Furthermore, as the district court correctly observed in distinguishing *Lehigh* (Pet. App. 14-15):

> In the case at hand, the Interstate Commerce Commission did not sanction defendant's payment of the trip permits, but indeed an ICC representative, on several occasions before the tariff was amended, informed the defendant that its actions were improper and in likely violation of the Elkins Act. In addition, *Lehigh Coal* involved prosecution of a shipper for acceptance of concessions, whereas here defendant carrier drafted the tariff and is, correspondingly, held to a higher standard of knowledge of it.

Recently, in *United States* v. *United States Steel Corp.*, *supra*, the Eighth Circuit, in remanding an Elkins Act prosecution against a shipper for further proceedings under the primary jurisdiction doctrine, stated in dictum that the defendant could raise a defense concerning its good faith and reasonable belief that the tariff permitted its actions. Slip op. 17-23. There are several fundamental differences between this case and *United States Steel*. Accordingly, whether or not the Eighth Circuit's conclusion

was correct, there is no conflict between the Eighth and Ninth Circuits.

First, the court in *United States Steel* emphasized that a good faith defense would be available only if the shipper proved both that it honestly believed that the tariff permitted its actions and also that its belief was a reasonable one. Because both the district court and the court of appeals in that case agreed that the tariff was ambiguous on its face, the court of appeals concluded that it might be possible for the defendant to demonstrate the reasonableness of its belief. In the present case, in contrast, both the district court and court of appeals correctly concluded that there was no ambiguity in the tariff, and petitioner's purported belief that the tariff permitted its rebates (despite warnings from Commission officials) could not be reasonable.

Second, the proceeding in *United States Steel*, as in *Lehigh Coal and Navigation Co.*, was against a *shipper*, while this case is a prosecution against a *carrier*. Whether or not a shipper may have a defense of good faith mistake concerning a tariff's meaning, the Elkins Act specifically provides that carriers—who draft their own tariffs and are free to amend or clarify tariff provisions—are held to a standard of strict liability. Thus, as the district court noted in this case (Pet. App. 8-9), former 49 U.S.C. 41(2)[5] provides in pertinent part (emphasis supplied):

> Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the [Interstate Commerce] Act * * * or participates in any

[5] Section 41(2) is recodified without substantive change in 49 U.S.C. (Supp. III) 11916.

> rates so filed or published, *that rate as against such carrier*, its officers or agents, in any prosecution begun under sections 41, 42, or 43 of this title, *shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed an offense under this section.*

As this Court stated in *United States* v. *Braverman*, 373 U.S. 405, 406 (1963): "More unequivocal language would be hard to imagine." Thus, at least as far as carriers are concerned, "any departure" from the rate prescribed by tariff is conclusively "deemed an offense under this section." The courts below correctly declined to disregard this explicit statement of congressional intent. See generally *United States* v. *Park*, 421 U.S. 658, 672-673 (1975).

In sum, no case of this Court or of any court of appeals has held or even suggested that a carrier may defend an Elkins Act prosecution on the ground that it entertained a good faith misconstruction of its own unambiguous tariff. There is thus no reason for this Court to grant review of petitioner's contention to this effect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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